NEXT ANNUAL MEETING WILL BE HELD AT MILWAUKEE AUGUST 29-31

AMERICAN BAR ASSOCIATION JOVRNAL

VOL. XX MAY, 1934 NO. 5

Legal Aspects of Legislation Underlying National Recovery Program
BY CHARLES E. CLARK

The National Recovery Act: Is It Constitutional?
BY HAL H. SMITH

Essential Factors in Determining Constitutionality of Recovery Act
BY DAVID L. PODELL

Constitutional Aspects of National Recovery Program
BY FREDERICK H. WOOD

Review of Recent Supreme Court Decisions
BY EDGAR BRONSON TOLMAN

Bar Associations Work on Coordination Subjects

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PROGRAM FOR ASSOCIATION'S BROADCAST ON CRIMINAL LAW

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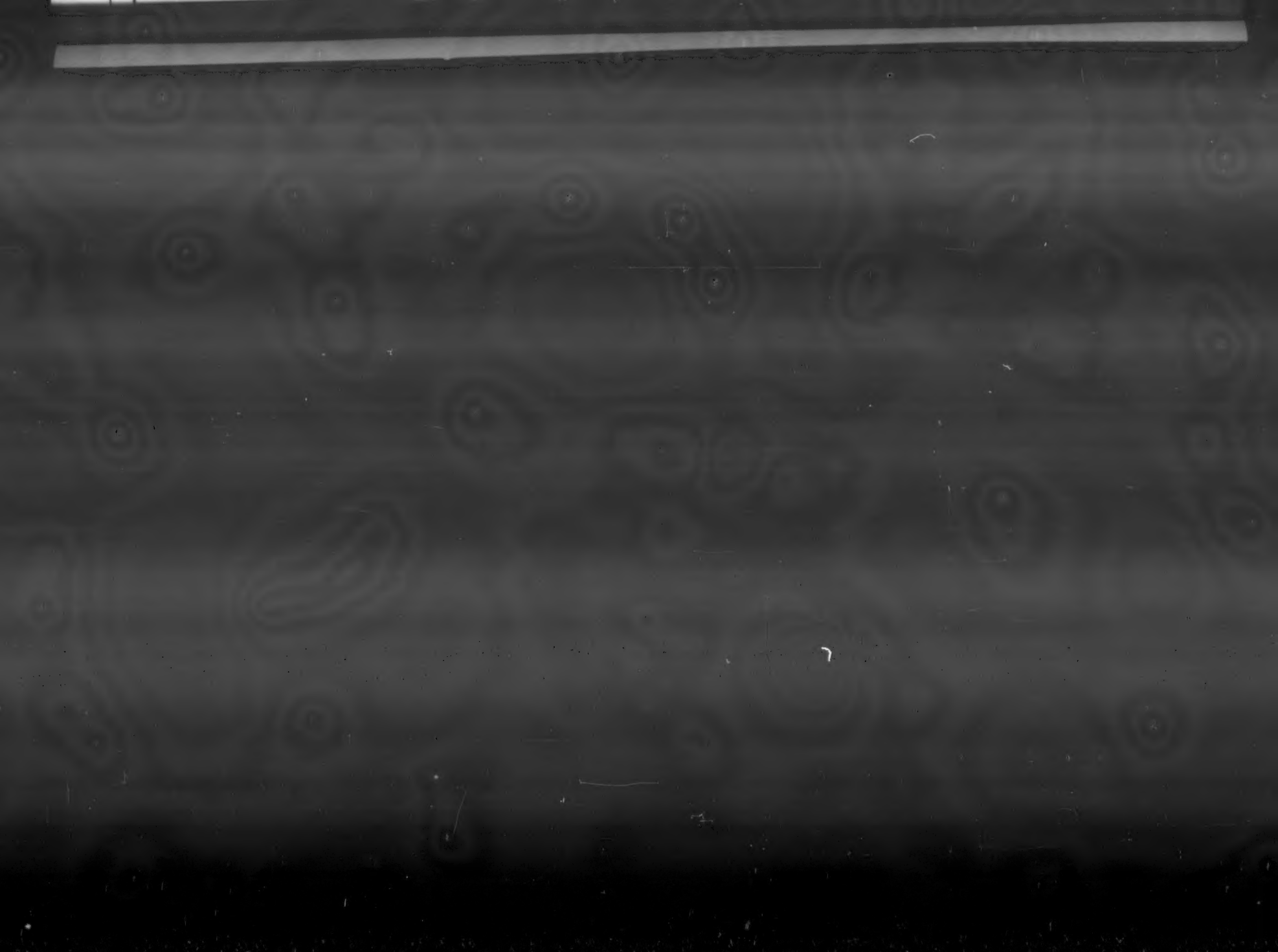

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Association's Commerce Committee Holds Meeting in New York City and Hears Discussion of National Recovery Act and Important Proposed Federal Legislation

THE annual meeting of the Committee on Commerce of the American Bar Association held in New York City has been held so many years that it has now become almost traditional. The meeting this year was held on Tuesday, Wednesday and Thursday, April 10th, 11th and 12th.

On the first day of the meeting two interesting subjects were discussed—in the forenoon the so-called Tugwell and Copeland bills concerning pure food and drug laws and regulations. Mr. Charles Wesley Dunn addressed the meeting, favoring the enactment of legislation and suggesting numerous amendments to pending bills avoiding, as he argued, many constitutional difficulties.

At the afternoon session Mr. Raoul E. Desvernine of Hornblower, Miller, Miller & Boston, New York City, presented an argument based almost entirely on constitutional questions concerning the proposed federal regulation of stock exchanges, and opposed such legislation.

The entire day Wednesday was devoted to a consideration of the legal aspects of the legislation underlying the recovery program. Dean Charles E. Clark of Yale University Law School, Mr. Frederick H. Wood, Mr. Benjamin A. Javits, Mr. Hal H. Smith, General Counsel of Michigan Manufacturers Association, Mr. David L. Podell, co-author of the National Industrial Recovery Act, Mr. Gilbert H. Montague, Mr. James A. Emery and Mr. Julius Henry Cohen discussed this subject. Dean Clark and Mr. Podell very effectively upheld the National Industrial Recovery Act and the comments of Messrs. Cohen, Javits and Montague were along similar lines. On the other hand, Messrs. Wood, Smith and Emery stoutly maintained that the Recovery Act was unconstitutional.

The Regulation of Motor Vehicles in Interstate Commerce was discussed at the Thursday meeting by Mr. A. P. Russell, Executive Vice President of the New York, New Haven & Hartford R. R., representing the carriers, and Mr. R. C. Fulbright, representing the National Industrial Traffic League.

Mr. Gilbert H. Montague suggested to the Committee that legislation be recommended requiring the filing of all Federal administrative rules, orders and regulations with the Secretary of State before they became effective and requiring publication thereof by the Secretary of State at least every six months.

American Bar to Broadcast Series on Criminal Law

A SERIES of four broadcasts on criminal law enforcement under the title of "Coping with Crime" and including an address by Attorney-General Cummings will be presented by the American Bar Association over the Red network of the National Broadcasting Company, beginning Saturday night, April 28 at 10:30 P. M. Eastern Standard Time. This subject, the first one on the National Bar Program, is of great interest to the profession and the speeches will deal with some of the topics with which the recent criminal law questionnaire, sent out to all bar associations, is concerned. The addresses will be keyed to the lay listener as well as the lawyer. The first program will be given at 10:30 P. M. Eastern Standard Time, all the others at 10:30 P. M. Eastern Daylight Savings Time, which means 9:30 P. M. Eastern Standard Time.

The subjects and speakers are as follows:

April 28, 10:30 P. M. Eastern Standard Time—"Meeting the Lawyers' Responsibility to Improve Criminal Justice," by Earle W. Evans, President of the American Bar Association. Introduced by Col. William J. Donovan of the National Advisory Council on Radio in Education.

May 5, 10:30 P. M. Eastern Daylight Savings Time—"Fighting the Gangster and the Racketeer," by Thomas D. Thacher, former Solicitor General of the U. S.

May 12, 10:30 P. M. Eastern Daylight Savings Time—"How the Government Battles Organized Lawlessness,"

by Homer S. Cummings, Attorney General of the U. S.

May 19, 10:30 P. M. Eastern Daylight Savings Time—"A Better Army for the War Against Crime," by Justin Miller, Chairman of the Criminal Law Section of the American Bar Association, Dean of the Duke University Law School.

The series is being sponsored by the National Advisory Council on Radio in Education which last year sponsored the broadcasts on "The Lawyer and The Public."

The time is being donated by the National Broadcasting Company.

Association's Committee on Commercial Law and Bankruptcy Actively Opposing "Municipal Bankruptcy Bill"—Minority Report Sustains Organization's View of Danger

THE Association's Committee on Commercial Law and Bankruptcy has sent a letter to the members of the General Council of the Association asking their active cooperation in the fight against the passage of the "Municipal Bankruptcy Bill," now on the floor of the Senate. The Committee was directed by the Executive Committee of the Association, at its meeting in Washington in May, 1933, to oppose the measure. On January 30, 1934, its representatives appeared before the Bankruptcy Sub-Committee of the Judiciary Committee of the Senate and presented their views in opposition. Since then the committee has continued its efforts to secure the defeat of the bill.

The Wilcox-Sumner Bill (S. No. 1868 and H. R. 5950) was recommended to the Senate for passage by a divided vote of the Judiciary Committee. The members who signed the Minority Report (Senators Van Nuys, Hastings, Hebert and McCarran) are four out of the five members of the Bankruptcy Sub-Committee which conducted the hearings on the bill. This report challenges the view of the Majority Report, presented by Senator Neely, that the measure is constitutional and opposes its passage on this ground as well as on the question of general policy.

On the first point, after a pointed discussion of the legal question involved, it declares that "it is impossible to envisage a sovereign State as subject to bankruptcy courts. The power of the states and their subordinate governmental agencies to borrow money, incur obligations, and fix tax levies is essentially a function of the sovereign States, legislative in nature, and cannot be delegated to the judicial branches of the States, much less to the judicial branches of a foreign sovereignty."

On the matter of policy, the Minority Report says that it subscribes to the opinion expressed in the report of the American Bar Association's Committee on Commercial Law and Bankruptcy, that the inevitable result of the policy proposed "must be to depress the market for municipal securities and seriously impair the credit of cities in sound financial position"—which report was unanimously approved by the Association. It continues:

"Municipal securities have always been considered gilt edge investments. They have ranked second only to the obligations of the Federal and State Governments. Probate courts have for generations authorized and directed guardians, trustees and administrators to invest the trust funds under their control in municipal securities. The American Legion Endowment Fund Corporation now has approximately four and one-half million dollars invested in the bonds of municipalities and other political units. The capital of this corporation was contributed by public spirited citizens all over the United States for the purpose of creating an income which is expended solely for the rehabilitation and child welfare work in connection with the veterans of the World War. The officers of this fund are strongly opposed to the passage of this legislation. The funds of scores of fraternal insurance orders are similarly invested and such fraternal orders have gone on record as opposed to the bill.

"The testimony taken at the hearings did not develop the fact that this legislation was necessary to avoid universal repudiation of municipal debts. While no witness seemed possessed of very accurate information on the subject, it was stated by the different witnesses that from 250,000 to 400,000 taxing districts would be potentially subject to this legislation. It is further safe to assume that approximately 2,000 of such units are in default in the payment of principal or interest or both on their obligations at this time. It is further agreed that there are outstanding approximately $20,000,000,000 of such municipal securities. In the face of such facts it surely cannot be argued that legislation of this character is universally demanded.

"The most insistent demand for this legislation comes from cities which were overdeveloped during boom days when real-estate prices were pyramided and unreasonable and wholly unwarranted public improvements were projected upon such pyramided values. While it is palpable that such cities are at this time seriously involved, it is the duty of the State to come to the relief of such communities rather than to involve the faith and credit of the tens of thousands of solvent municipalities throughout the entire country by the passage of such Federal legislation as is here demanded. It is quite evident from the decision in the case of *Home Building & Loan Association* v. *Blaisdell,* rendered by the Supreme Court of the United States on January 8, 1934, that the State, through proper legislation, may declare such moratoria as may afford temporary relief to certain of its political subdivisions. It may also provide for direct relief to such municipalities and other political subdivisions. If this be true, we question the propriety of the Federal Government entering into the legislation contemplated by the bills under consideration."

The Committee on Commercial Law and Bankruptcy in the letter above referred to, which was signed by Chairman Jacob M. Lashly and Henry C. Shull, Frank C. Olive, Edwin S. S. Sunderland and Robert Stone, declares that "it is believed that this legislation is the most dangerous which has yet been proposed. There are some spots in the country, especially in Florida, where there undoubtedly is serious embarrassment due to overexpanded debt situations, but it is believed that much more serious results will follow from resort to national legislation for local relief at the expense of the financially sound cities and taxing units in other sections of the country. Many of the investment banker groups who have widely distributed municipal bonds of communities now distressed and bondholders' protective committee interests are backing this legislation. But it is believed that its passage will impair the value of present and future issues of municipal bonds in sound communities everywhere. Lawyers can appreciate, perhaps better than others, that municipalities, especially large cities, if placed in the jurisdiction of the United States District Courts for a bankruptcy operation will suffer profound disturbances and their fiscal systems will likely be in chaos for years. Tax payers' strikes and increasing difficulties in tax collections and disbursements through normal and well understood channels and methods can reasonably be expected. We believe it is the duty of every loyal member of the Association who concurs in the position taken upon this subject to exert his influence to prevent the passage of this bill. It has already been passed in the House. It is now placed on passage in the Senate."

Another reason for opposition is thus stated by a member of the Association's Committee:

"The worst feature of this legislation is that it permits a general moratorium which will undoubtedly be abused by the cities in most instances, in that dur-

ing the moratorium they will be permitted to go forward with any wasteful and uneconomical plan that they are engaged in. Having obtained a moratorium, it is easy to suppose that the municipality will have difficulty in arriving at a readjustment of its financial affairs which will be acceptable to the holders of the necessary two-thirds of each class of debts. In many instances the consent of this percentage of debts will not be obtainable and consequently creditors' rights will have been placed in jeopardy as a result of the moratorium without any useful purpose having been accomplished. There will unquestionably be such a clash between the Federal control and the political control of these operations that the best results possible from the standpoint of creditor will not be obtainable."

The Committee on Commercial Law and Bankruptcy has also lodged with the Senate Judiciary Committee a brief opposing the Corporate Reorganization measure on constitutional grounds.

Distinguished Speakers for Annual Meeting

WORK on the program for the next Annual Meeting, to be held at Milwaukee on August 29, 30, 31, is already under way. Two distinguished lawyers have already accepted invitations to deliver addresses on that occasion—Lord Tomlin, Lord of Appeal in Ordinary since 1921, and Hon. Nathan L. Miller, former Governor of New York.

Lord Tomlin is very pleasantly remembered by American lawyers as one of the English delegation which came over in 1930 to return the visit which the American lawyers paid to the ancient shrines of the Common Law in 1924. He made an address at the banquet of the Association at the Annual Meeting in Chicago. His title is Baron Tomlin of Ash and he has had a distinguished career at the Bar and on the Bench since he was called to the Bar for Middle Temple and Lincoln's Inn in 1921. He became King's Counsel in 1913 and Bencher of Lincoln's Inn in 1918. He was Judge of the High Court, Chancery Division, 1923-29.

Earlier in his career he was counsel to various important governmental bodies. He has been chairman of the Royal Commission on Awards to Inventors since 1923; was chairman of the Child Adoption Committee in 1925; chairman, University of London Commissioners in 1926; chairman, Royal Commission on Civil Service, 1929. He is the joint editor of the 7th and 8th editions of Lindley on Partnership and joint author of the supplement to the 7th edition of Lindley on Partnership on the Limited Partnership Act of 1907.

Hon. Nathan L. Miller has likewise had a distinguished career. In addition to his service as Governor of the Empire State, he has sat on the Bench of the Supreme Court of the State of New York and on the Court of Appeals of that State. He resigned from the last position to resume practice, his firm being Hornblower, Miller, Miller and Boston. He is General Counsel, Director and Member of the Finance Committee of the U. S. Steel Corporation and a Trustee of the Mutual Life Insurance Co. of New York.

American Law Institute to Hold Twelfth Annual Meeting in Washington, May 10-12

THE American Law Institute will hold the Twelfth Annual Meeting at the Mayflower Hotel, Washington, D. C., on Thursday, Friday and Saturday, May 10, 11 and 12. It will consider Proposed Final Drafts of the Restatement of Conflict of Laws, and Proposed Final Drafts of the Restatement of Torts, with a view to having them adopted as Official Drafts. The Council has submitted also, with a view to criticism and suggestion, Tentative Drafts of the Restatement of Property and Trusts.

A meeting of the Bar Association Committees appointed to cooperate with the Institute, and those working on State annotations of the Restatements, will be held on Wednesday morning, May 9. A reception by the Council to members, guests and ladies accompanying them will be held on Wednesday evening, May 9.

The following is the complete program of the meeting:

Wednesday, May 9

10:00 A. M. Registration of members and guests in the Pan-American Room, Mayflower Hotel, until 10:00 P. M.

11:00 A. M. Meeting of Bar Association Cooperating Committees, Chinese Room, Mayflower Hotel. Members and guests of the Institute are welcome to attend this meeting.

9:30 P. M. Informal reception by the Council to the members, guests and ladies accompanying them, in the Ball Room of the Mayflower.

Thursday, May 10

9:30 A. M. Registration and assembling of members and guests.

10:00 A. M.

1. Address by the President, George W. Wickersham.

2. Informal remarks by the Chief Justice of the United States.

3. Report of the Treasurer, George Welwood Murray.

4. Report of the Director, William Draper Lewis.

5. Report of Herbert F. Goodrich, Adviser on Professional Relations.

6. Report of the Committee on Membership, to be presented by the Chairman, George E. Alter.

7. New business.

11:30 A. M. Consideration of the Proposed Final Drafts of the Restatement of Conflict of Laws. (Drafts Nos. 4 and 5.)

1:00 P. M. Adjournment for luncheon.

2:15 P. M. Continuation of the discussion of Conflict of Laws.

5:00 P. M. Adjournment.

Friday, May 11

10:00 A. M. Consideration of the Proposed Final Drafts of the Restatement of Torts. (Drafts Nos. 1 and 2.)

1:00 P. M. Adjournment for luncheon.

2:15 P. M. Continuation of the discussion of Torts.

5:00 P. M. Adjournment.

5:00 P. M. Reception and tea in the Chinese Room of the Mayflower to members, guests and ladies accompanying them.

Saturday, May 12

10:00 A. M. Consideration of the Restatement of Trusts, Tentative Draft No. 5.

1:00 P. M. Adjournment for luncheon.

2:15 P. M. Consideration of the Restatement of Property, Tentative Drafts No. 5.

5:00 P. M. Adjournment.

7:30 P. M. Dinner in the Ball Room of the Mayflower. George W. Wickersham, President of the American Law Institute, will preside. The speakers at the dinner will be announced later.

NOTE: If the discussion of any draft is concluded before the time stated on the program, the next draft in order will be taken under consideration immediately.

Inquiries for further information should be addressed to Miss Anna M. Judge, Executive Secretary to Director, 3400 Chestnut Street, Philadelphia, Pa.

Selden Society Issues Interesting Annual Report

THE Selden Society which publishes the sources of English law has just issued its interesting Annual Report. Subscribers for 1933 received a volume of the "Year Books of 1 Henry VI," by Mr. H. C. Williams, and as a bonus volume Select Cases in the Exchequer Chamber by Miss M. Hemmant.

The Society is steadily gaining in the matter of time and for the first time in many years will be able to issue the volume or volumes for 1934 before July 1st of the same year in which the subscription is paid. The regular volume

will be "Year Books of 10 Edward II" by Miss Dominica Legge and Professor Sir William Holdsworth. The bonus volume will contain the text of the earliest Assize Rolls preserved at the Public Record Office. These are the rolls for Lincolnshire for 1218-9 and Worcestershire for 1221. They were used by the famous Bracton and facsimiles of his markings on the Rolls will be reproduced in the volume, which is edited by Mrs. Doris M. Stenton. This volume will have a general interest for historians and libraries quite outside the ordinary subscribers to the Selden Society, and those who wish to obtain it should communicate with the American secretary as below.

The Selden Society also have in active preparation four Year Books, two volumes of Select Cases in the King's Bench in the reign of Edward I, a treatise on the Jurisdiction of the Admiralty, and a Glossary of Anglo-Norman legal and official terms. The Council have made arrangements by which members will receive a copy of a "Word List of Mediaeval Latin Terms" which is to be published by the Mediaeval-Latin Dictionary Committee of the British Academy.

The Selden Society is now represented upon its Council by four American members: Judge Julian W. Mack, Dean John H. Wigmore, Dean Roscoe Pound, and the American Secretary, Mr. Richard W. Hale, whose address is 60 State Street, Boston, Massachusetts.

What the Term "Learned Profession" Should Embrace Is Discussed in Carnegie Foundation's Annual Review of Legal Education

EXPANSION of the concept of a "learned profession" is advocated in the Carnegie Foundation's Annual Review of Legal Education, prepared by Mr. Alfred Z. Reed. He takes the position that we ought not to define the term "learned profession" too narrowly. "Our new country—our land of courageous innovations—ought to be able," he says, "to bring within the university sphere callings which in other countries traditionally stand outside. That it has done so is not to be regarded as an unfortunate break with the past. Rather, it is evidence that we do not intend to let an inherited mechanism restrict the free development of social and economic activities. It is futile to rail at American colleges and universities because they break with tradition. . .

"Professional work, in the group of universities that we have in mind," he says further on, "should embrace all those callings—neither more nor less—in which (as originally was true only in the case of theology, law, and medicine) a substantial body of higher learning already exists, or is in the process of being accumulated. . . [But] even though a particular calling satisfies these criteria, and preparation for it is properly offered by a school that moves on the university plane, it does not necessarily follow that this school should be admitted to the educational brood that is cherished under any particular university wing. Are we sure that simply banding together numerous professional schools, under the aegis of a single greatly expanded university, will give us what we want?" A university of this sort is likely to be "an unwieldy aggregation of units, formally connected with one another but not possessing the self-conscious unity of a living whole. Our modern enormously diversified scientific and economic activities have perhaps brought with them this consequence. In place of the ancient concept of 'a university,' dedicated to the advancement of knowledge and the learned professions, it should now be our aim to develop distinct types of universities."

The article "Learned Professions and Their Organization" discusses also the relationship and mutual pressure exerted by three organizing forces: practitioners' associations, the State, and educational institutions. Under the first head, a distinction is drawn between the organization based on specialization and the organic union or fraternal association of those who practice these activities. "As contrasted with the natural fluidity of the specializing impulse," he says, "organizations are relatively rigid, and constitute a stabilizing social force. For a time, this may be an advantage, but it is also a danger. Sooner or later, the lines of organic division cease to coincide with those of the developing economic pattern. Practitioners associations constitute an artificial element that is quite as likely to require reformation itself as it is to serve as our guide to professional betterment. England and America now contain an enormous number of these practitioners associations."

The attitude of the State is discussed under the three heads of "Specially Privileged Associations," "Direct Governmental Administration," and "Licensing of Individual Practitioners." This is followed by a pertinent consideration of "Distinctive Traits of American Univerities."

The Review states that the number of lawyers in proportion to the population of the United States, after decreasing, for the first time, in 1910 and again in 1920, showed according to the 1930 Census "a sharp increase, which still leaves the number well below the peak attained in 1900. Meanwhile, the progressive shift of the working population from agricultural into industrial and commercial pursuits has presumably increased the demand for lawyers."

The Review records changes made during the past year in bar admission requirements, and outstanding developments among the law schools. Comparative tables show the present requirements for admission to the bars of each of the sixty states and Canadian provinces, and changes in the number of law schools of different types, and of their students, during the last forty years. The individual schools are listed, with their tuition fees, student attendance, and the time required to complete the course, in parallel columns, distinguishing from the 83 full-time law schools of the United States and the 4 full-time law schools of Canada, the 107 part-time or "mixed" schools in this country that offer instruction at hours convenient for self-supporting students, and the 6 Canadian schools in which the students serve a concurrent clerkship in a law office.

An appendix quotes the current standards of the American Bar Association and of the Association of American Law Schools, and lists the publications of the Carnegie Foundation dealing with legal education and cognate matters. Copies of these publications, including the present "Review of Legal Education in the United States and Canada for the Year 1933," may be had without charge upon application by mail or in person to the office of the Foundation, 522 Fifth Avenue, New York City.

New York County Lawyers' Association Celebrates Silver Anniversary

THE silver anniversary of the New York County Lawyers' Association was celebrated with a banquet on the evening of March 14. Eight hundred members and guests attended and notable addresses were made.

According to the report in the New York Law Journal's issue of March 15, the toastmaster was Charles A. Boston, president of the Association, and addresses were delivered by Attorney-General Cummings, Senior Associate Judge Frederick Evan Crane of the Court of Appeals, Presiding Justice Edward R. Finch of the Appellate Division, First Department, Thomas D. Thacher, president of the Association of the Bar, and Benno Lewinson, the very active treasurer of the Association for many years past.

An interesting souvenir was presented to each guest, consisting of an

"art plate" group of the fourteen presidents of the Association, the names in chronological order being: John F. Dillon, Alton B. Parker, Joseph H. Choate, Thomas H. Hubbard, Edgar M. Cullen, Henry A. Gildersleeve, Morgan J. O'Brien, Charles E. Hughes, Charles Strauss, James A. O'Gorman, Samuel Seabury, William Nelson Cromwell, Henry W. Taft, Charles A. Boston. Of those named the first six have passed away.

Attorney General Cummings' address, on "Immediate Problems for the Bar," was printed in the April issue of this Journal. Justice Finch felicitated the Association upon the fact of its organization, the things it has accomplished and the celebration of its twenty-fifth anniversary. He also presented some striking statistics on the work of the courts and offered some constructive suggestions for reform in legal procedure. Judge Thacher spoke of the peculiar responsibility of the Bar for leadership in respect to all that touches the administration of justice. Mr. Lewinson, a member of the first board of directors, former chairman of the membership committee of the Association, and Treasurer for the last fifteen years, recalled interestingly the first meeting of the organizers, presided over by Judge Dillon, and details of other events and personalities in the history of the association. Judge Crane's remarks on this occasion do not appear in the report of the New York Law Journal.

Washington Letter

1266 National Press Building,
Washington, D. C.,
April 11, 1934.

Limiting Jurisdiction of the District Courts

ON April 10 Representative Lewis, of Colorado, from the Committee on the Judiciary of the House of Representatives, submitted a report (No. 1194) on S. 752, known as the "Johnson bill," to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of State administrative boards.

The majority report recommended that the following be substituted for the bill as passed by the Senate:

"That the Judicial Code, as amended, is amended by adding after section 266 thereof a new section to read as follows:

"Sec. 266 A. In the case of any suit brought in a United States District Court to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of any State or any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with such order, where (1) such order affects rates chargeable by a public utility, does not interfere with interstate commerce, and was made after reasonable notice and hearing, and (2) jurisdiction of such suit is based solely upon the ground of diversity of citizenship, or of the repugnance of such order, or of the law or ordinance under which such order was made, to the Constitution of the United States, or solely upon any combination of such grounds—

"(a) The provisions of section 266, as amended, which relate to hearings and determinations by three judges, to the right of direct appeal to the Supreme Court of the United States, to a stay of proceedings, and to precedence and expedition of hearings, shall apply, whether or not an interlocutory injunction is sought in such suit; and, when an interlocutory injunction is sought, the provisions of such section relating to notice of hearing and to temporary restraining orders shall apply;

"(b) The hearings and determinations shall be on a transcript of the record of the proceedings, including evidence taken, before such administrative board or commission with respect to such order, prepared at the expense of the complainant, and certified to the court by the board or commission in accordance with the law or practice of the State, except that (1) upon application of any party the court may take additional evidence if it is material and competent and the court is satisfied that such party was by the board or commission denied an opportunity to adduce it, and (2) in case no record was kept or the board or commission fails or refuses to certify such record, the court may take such evidence as it deems necessary;

"(c) The court shall not have jurisdiction if the complainant (or, in case the complainant is a partnership, association, or corporation, if the complainant or a member or stockholder of the complainant has heretofore commenced suit in a State court having jurisdiction thereof to contest the validity of such order on any ground whatsoever.

"Sec. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effects as if this Act had not been passed."

The Committee proposes to amend the title of the bill to read: "An Act relating to jurisdiction of and procedure in district courts in suits to enjoin, suspend, or restrain the enforcement of rate orders, and for other purposes."

In their report, the majority of the Committee state:

"The Johnson bill (S.752) seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commissions affecting rates chargeable by public utilities. The majority of the Committee on the Judiciary believe the bill presented corrects all present evils without wholly divesting the Federal district courts of all jurisdiction in rate cases."

The majority of the Committee regards as unnecessary and unwise the drastic action proposed by the Johnson bill of withdrawing altogether from the District Courts of the United States all jurisdiction in rate cases, when every abuse in the present procedure can be corrected and every injustice obviated by amending the Judicial Code as provided in the proposed substitute.

The majority regards the Johnson bill as unwise because

"(1) It is discriminatory, in that it would single out one class of litigants (viz, public utilities) and deny to them the right, which all other classes of litigants would continue to enjoy, to resort to the United States courts in controversies which arise 'under the Constitution or laws of the United States' (par. 1, sec. 24, Judicial Code).

"(2) It is a step toward abolition of the District Courts of the United States.

"(3) Although the right of ultimate appeal to the Supreme Court of the United States is retained in the Johnson bill, it would deny to a public utility any effective review of the facts by a United States court in that the Supreme Court is not equipped to examine the facts—and the facts are of the essence of a rate case. As was said by Mr. Justice Holmes in Prentis v. Atlantic Coast Line (211 U. S. 210, 228), a case involving rates of a railroad:

"'If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the

two—pure matters of fact. When those are settled, the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be.'

"(4) Controversies affecting rates chargeable by a public utility are, from their very nature, such as are liable to be affected by local prejudice. They are precisely the kind of controversies for the adjudication of which the First Congress created, under the mandate of the Constitution, the District Courts of the United States.

"(5) In every rate case there are two groups of citizens, the ratepayers and the owners of the securities of the utility corporation. On the one hand the ratepayers constitute a compact local group. They should be guaranteed prompt relief from excessive rates. On the other hand, the owners of the securities of a utility are frequently scattered throughout the Nation. They are entitled under the spirit, if not the letter, of the Constitution of the United States to a fair and impartial trial on the facts as well as on the law before a tribunal free from local bias."

The minority report, which was signed by Representatives Sumners, Chairman of the Committee, McKeown, Browning, Oliver, Gregory, Tarver, Miller, Ruffin, Lloyd and Guyer, in recommending the passage of S. 752, quoted in full the majority report of the Senate Committee on the Judiciary.

Rules in Actions at Law

On April 12 Senator Ashurst (by request) introduced S. 3040 to give the Supreme Court of the United States authority to make and publish rules in actions at law. The measure provides:

"That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

A similar bill (H. R. 8907) was introduced in the House of Representatives on April 2d by Representative Sumners of Texas. Both bills were introduced at the request of the Attorney General.

Gold Clause of Public and Private Contracts

On March 15 Senator Glass, of Virginia, placed in the Congressional Record (Page 4720) an account of the decision by Judge John R. King, of the Court of Common Pleas, Columbus, Ohio, on the gold clause of public and private contracts. This was the first decision rendered in this country on the subject, according to the Senator's statement. Senator Glass stated: "The decision follows the line of the decision of the highest court in Great Britain in maintaining the validity of these gold clauses. It is a matter that is going to concern the American people very much more seriously and to a larger extent than they seem to be concerned about it now."

According to the decision, it takes $6,000 in currency to pay $3,600 gold obligation. After reviewing the decisions in the English Courts, Judge King adopted the view of Lord Russell and concluded:

"The plaintiff in the instant case, under the contract, is entitled to have the obligation paid in lawful currency of the United States of America in a sum equal in value to the amount of gold called for in the note. Any other construction, in our opinion, would destroy the contract."

As to the contention that the contract was made invalid and unenforceable by the acts of Congress taking gold out of private hands, the court stated:

"It is urged in brief by defendant that the obligation of defendants entered into before the passage of the act of Congress and the orders of the Secretary of the Treasury and the President of the United States is canceled and nullified by the act of Congress; consequently they are not obliged to pay their debts. With this contention we cannot agree. . .

"Moreover, Congress is without authority to cancel the debt owed by defendants to plaintiff, calling for payment in gold, which contract or obligation at the time it was entered into was in all particulars lawful.

"If defendants were correct, it would amount to the confiscation of plaintiff's property without compensation. The Constitution of the United States would not permit legislation producing such results as contended by defendants."

On April 4 Senator Costigan inserted in the Congressional Record (Page 6107) a decision by Judge Arlington Taylor, one of Colorado's district court judges, who, in ruling on a demurrer, sustained the antihoarding act on the ground of impossibility of performance, and held sufficient an offer of payment in legal tender of the United States.

The note sued upon was payable, both as to principal and interest, in United States gold coin and on default in interest payment suit was instituted for the full amount of the note. The defense was that it was legally impossible for the defendants to make any payments either of principal or interest or tender of payment of either in United States gold coin in accordance with the terms and effect of the said principal promissory note. They tendered into the registry of the court, legal tender of the United States Government in the amount of interest due on the principal note. To the answer the Plaintiff demurred and the court, in overruling the demurrer stated that the answer was a complete defense on impossibility of performance.

The Court further stated:

"The defendants in this case, in my opinion, cannot under existing congressional enactments and Executive orders go out and purchase 'any gold coin of the United States' with which to pay their interest or the principal. The impossible ought not to be required of them. Neither can the plaintiff require in other legal tender any excess over the amount of the actual interest due September 1, last, or what might be termed the equivalent of the increased value of gold on that date. Assuming gold to have greatly increased, for example, on that date, the plaintiff is not entitled to any excess aforesaid, for the reason that he could not go out and buy the gold equivalent therewith. It would be as impossible for him so to do as it is for these defendants. If he had the gold equivalent, he could not pay his own obligations with it. He would have to turn it to some Federal Reserve Bank and at par. His Government could get the profit or increase, but the plaintiff could not."

Securities Act of 1933

On March 26 the unanimous Report of the Special Committee of the American Bar Association on Amendments to the Securities Act of 1933, was released by the Chairman of the Committee, Chester I. Long.

The report had previously been submitted to the Executive Committee of the American Bar Association and approved.

Temporary changes are recommended until a thorough study and revision can

be completed. The committee proposes fourteen amendments that should be made to the act immediately "in order to cure some of the obvious defects and to remove the brake on recovery."

Permanent and complete revision of the Act, the committee urges, should be made after a careful investigation with the "aid of corporation directors and executives, bankers and lawyers familiar with the practical problems." It is the belief of the committee that such an investigation will make it apparent that the Act can be greatly simplified and clarified and that the substance of many provisions should be changed.

The committee points out that "the Act embodies the broadest definitions and uses the most general language, and is extraordinarily complex. As a result, the interpretation of many of its provisions is very vague and uncertain. It imposes drastic liabilities, in essence in terrorem, which are regarded by those made subject to them as unfair and unjustified. It radically alters the ordinary established machinery for the distribution of securities. It rides roughshod over legal principles which have been long established in our law. . .

"There has been a great deal of discussion as to whether or not the act has actually hindered the flow of capital through the distribution of securities. It is, of course, impossible to prove either side of this argument until the act has been in effect for a longer period, but in view of the nature of the act, as we have described it, it seems certain that the act must operate as a hindrance, at least until it is clarified by judicial interpretation. In addition, the expressed unwillingness, which we believe is sincere, of directors, officers, bankers and accountants to accept the liabilities imposed cannot be ignored. It is immaterial whether this unwillingness is based on exaggerated fears, as has been alleged. It is nevertheless a fact to be reckoned with. At the present time, at least, we believe the Act is a definite brake on recovery."

The committee takes issue with proponents of the Act who claim that it is substantially the same as the English Companies Act, pointing out ten major points wherein the two measures differ and that the English Act is not nearly so severe as the American law.

Nor does the committee think that the defects in the Act can be remedied by regulations adopted by the Federal Trade Commission. "Even if Congress had given the Commission the maximum lawful power to adopt regulations," the committee says, "we do not believe such powers would have been sufficient."

Several of the recommendations of the committee were embodied in a bill introduced in the Senate April 5th by Senator Hastings (S. 3301) and which was referred to the Senate Committee on Banking and Currency.

On April 9 Senator Hastings had inserted in the Appendix to the Congressional Record (page 6445) numerous opinions relative to the Securities Act collected by the Washington Post.

Among those urging changes in the Securities Act is Governor Eugene Black of the Federal Reserve Board who stated on April 9th that the Securities Act should be, and will be modified. He expressed the opinion that the Securities Act was having a bad psychological effect on business.

The House Mine bloc, composed of representatives of the mining states, is leading a movement for modification of the Act.

Certificates by Accountants or Other Experts Under Securities Act of 1933

On April 7 the Federal Trade Commission made public an amendment to the Rules and Regulations under the Securities Act of 1933. The first paragraph of article 15 is amended to read as follows:

"Any certificate by an independent certified, or public accountant with respect to a registration statement or any papers or documents used in connection therewith shall be dated and shall conclude with a statement substantially to the following effect:

"Subject to the foregoing comments, we have, after reasonable investigation, reasonable grounds to believe, and do believe, at the date of this certificate, that the statements contained in the attached balance sheets and in the attached profit and loss statements truly and fairly reflect the application of accepted accounting practices to the facts disclosed by our investigation, and that there is no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

Unique Body, Representing Local Bar Associations, Formed to Deal with Unlawful Practice in Los Angeles County

THE Los Angeles County Unlawful Practice Conference is a unique organization, composed of delegates from the various Bar Associations of the county, which devotes itself to the task of dealing effectively with the unlawful practice of the law in its territory. The following details of this undertaking have been furnished the JOURNAL by Mr. Marion P. Betty, chairman of the Conference:

"An organization to combat unlawful practice, so comprehensive as to include representatives of every bar and lawyers' association among this county's 5,500 or more attorneys, now is functioning as the Los Angeles County (Calif.) Unlawful Practice Conference. The Conference organized serves both as a central investigating and prosecuting body and as sponsor for prosecution of unauthorized practice in each and every member-district.

"An outstanding feature of the Conference plan is that they have a paid investigator and a paid prosecutor 'on the job' and at the call of the Conference Executive Committee and the representatives of the member-associations at all times, regularly and continuously ready to investigate and prosecute complaints. Paid employes can be dismissed and replaced should they prove derelict or inefficient, while volunteers cannot. A paid employe is naturally more dependable, diligent and anxious to make a good showing.

"Each member-association has an unlawful practice committee of at least three members, who may or may not be the representatives to the Conference. This committee is charged with the duty of receiving complaints and making sufficient preliminary investigation to determine if the cases merit forwarding to the executive committee of the Conference.

"The committee and its prosecutor then decide whether the individual case shall go back to the proper prosecutor in the district where it originated, or shall be referred to the district attorney of the county, and act accordingly. The investigator is sent into any district where his services are required at the discretion of the prosecutor.

"The Conference consists of delegate and two alternates from each of the nineteen member-associations, with only one vote, the senior present, allowed each association. The executive committee is composed of the three officers and a representative from each of six associations. Any association which fails to show sufficient interest, by having a representative absent from two consecutive meetings of the executive committee, will be dropped from the committee and replaced by another organization. Each member-association is contributing a nominal sum to the overhead of the Conference, and in addition, is pledged to pay for investigation and prosecution in its district.

"The Conference already has referred sufficient legitimate complaints to the prosecutor to keep him and his aide continuously busy. Although less than six months old at this writing, this form of organization has definitely proved a success in arousing the interest of legal organizations.

LEGAL ASPECTS OF LEGISLATION UNDERLYING NATIONAL RECOVERY PROGRAM

Three Main Lines of Attack on Constitutional Validity of Agricultural Adjustment Act and National Recovery Act Considered—Charge of Improper Delegation of Legislative Power Will Probably Fail—Recovery Acts Carefully Framed to Avoid Difficulty Due to State Power—Due Process in Light of Recent Decision in Nebbia Case—Recovery Legislation Apparently Due to Be Upheld except for Some Purely Local or Interstate Transaction*

By Charles E. Clark
Dean of Law School, Yale University

MY INTEREST in the recovery legislation has two aspects. The first is that of my professional activities as a law teacher. The second is my natural concern as a citizen in the destinies of myself, my family, my friends, in fact of us all. My competence to speak on either aspect is, I fear, unproven, but certainly if it exists at all, it is only as to the first, that is, the development of constitutional doctrine as applied to the recovery program. I shall therefore devote myself to that topic.

Experience has taught me, however, that listeners tend to confuse the two problems and to conclude that an expression of opinion favorable to the constitutional validity of the legislation must also include strong views as to its desirability. To avoid being misunderstood may I emphasize at once that my conclusions on the legal problem do not imply complete approval of the policies involved. Even at the expense of some digression from my main topic, but to be more explicit, I add that while I have expected a generally increasing responsibility of government for the control and direction of industry and desire the present experiment to succeed, yet I fear that too much has been attempted all at once. In trying to codify all industry within a few weeks or months there is danger of an oversimplification, a painting in black and white only of diverse and complex problems, a forcing of unlike things into a single mould, and a throwing of the aura of governmental approval around what may be only the judgments or codes of special and interested groups. The problem as I see it notably as to the N. R. A. is to reduce the field of attempted control to an amount which can actually be managed.

Such doubts as these, however, should be directed to the legislative and administrative bodies which devise and execute the programs. In my view they have no place in the application of constitutional doctrine to federal legislation. The main burden of what I shall have to say is that, in the light of historical objectives, past precedents, and desirable future policy, constitutional dogma should not be forced to assume responsibility for, to cover up, or even to prevent legislative mistakes. Many and important are the functions of the Supreme Court, not the least of which is to act as final arbiter of conflicts in a dual system of government. These do not include, however, passing upon the *desirability* of social legislation. I hope to show later that unusual emphasis upon due process, not included within its historical meaning, leads, however, to just that. The Court's essays in this direction actually have not been numerous. They have been in fact the occasional exception to the general judicial tolerance. But these occasional instances have led to practically the sole widespread criticism of the Court and have had to be erased by war, by constitutional amendment, or by withdrawal from the positions assumed. Exceptional though they actually are, the Dred Scott case, the Income Tax cases, the Lochner case, illustrate the dangers of extending the judicial function to include direction of governmental policy.

May I emphasize this yet more? Events of recent years have brought home to all the increasing complexity of social relations and our glaring failure to solve even elementary problems of economic adjustment. Are any of us willing to admit that we must suffer recurring periods of prosperity and panic in resigned inaction and that another five years such as we are now living through must soon again be the lot perhaps of ourselves, certainly of our children. There is in last analysis only one way we can improve our lot. That is the way of trial and error. If we are held from this by rigid constitutional shackles, then indeed we are unfortunate. Our official reports of decisions show numerous examples of learning through experiment. I need cite but a single one. Would it not have been unfortunate, when the state laws organizing systems of guaranteeing bank deposits came before the Supreme Court in Noble State Bank v. Haskell in 1911, if the Court had then declared the legislation invalid and prevented the later thorough demonstration of the unsoundness of the plan? Except for this unfortunate experience of the eight western states undoubtedly this would have been advanced as a panacea for our recent banking ills. I can conceive of nothing more undesirable at the moment, when both doubts and fears assail the N. R. A., than to have the Supreme Court take the responsibility of wiping it out of existence. I shall say dogmatically that I think the invalidating of this type of legislation on any ground of its

*Address delivered at meeting of the Committee on Commerce of the American Bar Association in New York City, April 11, 1934.

undesirability is an unwarranted extension of constitutional theory.

Within the time allotted to me it is obviously impracticable to discuss the validity of each of the many recovery acts or all the arguments to which resort may be had. I shall content myself with the three main lines of constitutional attack. These may apply to nearly all the acts but of course are most striking with reference to the legislation regulating production and industry, namely, the Agricultural Adjustment Act and the National Industrial Recovery Act. These lines of attack are first, the claimed improper delegation of authority from Congress to the executive, second, the claimed attempt to regulate business beyond the limits of interstate commerce, and third, the claimed violation of the rights of the individual guaranteed by the due process clause of the Constitution.

The first point I feel need not detain us long. Much talk there has been of improper delegation of power to the President, but actually no cases have held an act of Congress invalid on this ground. The idea goes back to the theory of separation of powers. But a doctrine which insures a desirable division of governmental function should not be pressed to the drily logical extreme whereby political responsibility is divided and scattered and all governmental action is inhibited. Actually the Supreme Court has announced workable conclusions whereby it is now settled that the Congress has the function of defining general policies and leaving their execution to the President. A Wisconsin case well explains the leading Supreme Court decision—the Hampton case dealing with the power of the President with respect to the so-called flexible tariff—as demonstrating "that there never was and never can be such a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called coordinate governmental powers. As a matter of fact, they are and always have been overlapping." Commentators, therefore, seem agreed that this ground of exception to the recovery program will fail. The Congress is properly the body to determine major questions of policy, but the freedom of debate which is a safeguard to its exercise of this function, renders it impotent as an executing organ. While wide powers are granted to the executive by the current legislation, yet on the whole care has been exercised to fulfill the requirement that a standard of at least a general nature shall be expressed to guide his way.

The other two major objections to the recovery legislation—intrusion on the power of the states and violation of due process—are in theory widely separated ideas. In practice, there is a tendency to fuse them into one. Thus much of the argument currently expressed against the New Deal, so-called, while explicity based upon limitations of the federal grant of power over interstate commerce really makes its appeal largely and at times almost wholly upon the restrictions imposed upon the rights of individuals. Moreover, such decisions of lower courts as to date have held parts of this legislation invalid, have been based upon a construction of the interstate commerce clause but have found evident satisfaction in thus finding a means of granting protection to the individual. From a tactical point of view, the objectors are wise in fusing the two claims. The emotional force of the argument of individual rights is backed up by the logical force of the doctrine of "Dual Federalism." If either alone seems barren and limited, together they come with much force.

In fact there is some basis in the precedents for such a fusion of claims. Decisions on state due process under the Fourteenth Amendment are most numerous, but decisions on federal due process under the Fifth Amendment are restricted to a mere handful, most of which are unimportant so far as concerns social legislation applicable to the entire country. Except for some recent tax decisions, there are only two cases of general relevancy—the Adair case of 1908 holding invalid a statute making it illegal for a railroad to discharge an employee because of membership in a union and the railroad "car-hire" case of 1931 dealing with regulations by the Interstate Commerce Commission for rentals of freight cars interchanged among railroads. The Adair case in particular appeared to say that since the Act in question was not due process, therefore, it was not a proper regulation of interstate commerce. There seems further an actual danger that there may develop a real no man's land where neither federal nor state legislation may apply and laissez faire must govern. I am indebted for this suggestion to an acute article on the interstate commerce phase of this question by that distinguished scholar of constitutional law, Professor Edward S. Corwin of Princeton, in the Cornell Law Quarterly for last June. Referring to the child labor decision of 1918—Hammer v. Dagenhart—holding invalid the Congressional attempt to exclude the products of child labor from interstate commerce, Professor Corwin points to the many cases declining to permit a state to bar goods of other states from entry within its borders, and asks the pertinent question whether there may not here be a field where under the logical implications of that decision neither state nor Congress may act.

Professor Corwin's article also has some acute observations upon the development of the whole doctrine of "Dual Federalism"—the striking and descriptive phrase is his—which the author traces to a late political concept of Madison designed to offset Marshall's powerful national opinions, notably that in McCullough v. Maryland asserting the implied powers of the Federal Government under the Constitution. It is quite appropriate for us to assert the sovereign authority of the several states within limits, but we should recall the implications of this doctrine if we support it to the extent of making it an important restriction on the powers of the central government. So extended, it is in opposition to probably the most cherished objective of our constitutional fathers, namely, to do away with the trade rivalries of the various states which had made commerce well-nigh impossible; it is opposed to the statesmanlike conception of the supremacy of national power asserted in the Constitution itself and given life and vitality by Marshall's famous decisions; and it repudiates the trend of our entire history as well as the teachings of the Civil War.

Therefore, in spite of the tendency to fuse these two arguments, I would urge that clear thinking and sound policy require them to be kept separate and distinct. The question of division of power between state and federal government is one which must and should contemplate that the power resides

somewhere, and that government is not impotent to act. The question of the rights of the individual against all government is quite a different one and should not be employed to confuse the issue of the location of power. The problem of what is interstate commerce is only placed in proper focus when the bounds of intrastate commerce are also considered as a part of it.

With respect to this problem the Recovery Acts are very carefully framed to avoid difficulty so far as possible. In general, they are limited in terms to the regulation of interstate commerce. Thus the N. I. R. A. after providing for its famous codes of fair competition goes on to state a penalty for any violation of them "in or affecting interstate commerce." This means that any attempt to extend the Act unduly to non-interstate business, while it may be an administrative mistake, is not a violation of Congressional power. This is much more than a mere quibbling of words. It means, in effect, that the general framework of the N. I. R. A. must quite surely be upheld as to transactions clearly interstate in character. The existence of this machinery, if the experiment turns out to be successful, may alone be enough in process of time to establish this form of regulation as a normal feature of our governmental system, state and federal.

It is true, however, that limitation of the effect of the codes by a restricted conception of interstate commerce would reduce the chances of success of the experiment. It might, in fact, render parts of the program quite unworkable, as for example the licensing provisions of the N. I. R. A.—not yet enforced—under which unlicensed businesses are excluded from interstate commerce. Against such a limited view of interstate commerce, however, at least two general lines of effective argument are available. The first is that already developed in the Supreme Court decisions whereby the power of Congress is held to extend to matters otherwise local which, in fact, unduly burden interstate commerce. Among many well known examples are the regulation of intrastate railroad rates, the application of the safety appliance law, the prohibition against forging of bills of lading, the regulation of the business of commission men and live-stock dealers in the great stockyards, the enforcement of federal grain standards, and the regulation of trading in grain futures. The later anti-trust cases, though proceeding on a different economic theory, are to the same effect on this point. All this is but a recognition of the actual fact, so forcefully pointed out by Chief Justice Taft in Stafford v. Wallace in 1922, that under modern conditions commerce is a continuous flow from production through the various stages of distribution until the consumer is reached. Touch this flow (which obviously exceeds the bounds of a single state) at any point and you affect the commerce itself. Under this concept it would seem quite possible that codes affecting local dyers and cleaners might be held not subject to federal enforcement without affecting such a case as Victor v. Ickes (61 Wash. L. Rep. 870, 1933) upholding retail price-fixing for local gasoline dealers, in view of its relationship to interstate petroleum distribution. In truth, such a line of division might not be wholly undesirable. It would force the N. R. A. to concentrate upon the more important industries and not to waste its energies in local businesses however vociferous they may be.

The other argument is a natural extension of this concept of burden upon interstate commerce. This is developed in the Recovery Acts themselves in their statements of the policy and the occasion for the Acts. Expressly stated it is that "the present acute economic emergency," to use the language of the Agricultural Adjustment Act, or "a national emergency productive of widespread unemployment and disorganization of industry," to use the language of the Industrial Recovery Act, has "burdened and obstructed the normal currents of commerce" to an extent to justify federal regulation so long as the present situation obtains. This presents a question of fact as to current conditions to the courts passing upon these acts, and a finding favorable to extensive regulation of industry would seem not without evidence to support it. Thus a finding that the present situation of overproduction of milk is affecting all interstate commerce in that commodity and renders necessary the regulation and limitation of all milk production certainly would not seem unjustified. Both these arguments are now available and would justify a liberal interpretation of the interstate commerce clause at least certainly for the time being.

Substantially the only obstacle to this general conclusion is the child labor decision above referred to (Hammer v. Dagenhart, 1918). That case, however, may be distinguished on at least two notable grounds. The first is that there the court found the intent of the act in question was to interfere with local commerce. Such, indeed, is the explanation of the decision in the second or child labor tax case. Such intent, as we have seen, is explicitly disclaimed in the present legislation. Once the court has held that the transactions before it are either interstate commerce or not interstate commerce, then the acts are in terms applicable or not applicable. In neither event is the child labor case in point on the issue. The other ground of possible distinction is on the basis of a finding of a fact, namely, of a burden on interstate commerce. The child labor case is a ruling that under the then conditions the manufacture of goods with the aid of child labor did not affect or restrict interstate commerce. But as we have just seen, present conditions might well justify a contrary holding to the effect that now local transactions are in fact a burden on interstate commerce.

One may, however, express a justifiable doubt as to the future force of that decision in any event. It was a five to four opinion which commentators have found difficulty in reconciling with prior and subsequent decisions of the Court. For example, Professor Corwin, in the article cited, effectively demonstrates its character as an anachronism. Decisions before and since that time upholding such legislation as the Dyer Automobile Theft Act, the Pure Food and Drug Act, the Mann Act, and the like, cast doubt upon its result. We may confidently assert that at least its orbit is not likely to be extended.

And so we come to the final argument, that based on due process. After all, this seems to me the fundamental problem, for the others involve merely the adjustment and location of power while this concerns its very existence. They present difficulties which can and must be ironed out, but this

offers a potentially permanent obstacle. I wish I had time to go into the fascinating story of due process at length, but I must content myself with certain general conclusions. May I refer you to my detailed discussion in the *"Fortune"* magazine for February, and also in an address before the New York State Bar Association on January 26th last, reprinted in the February New York State Bar Bulletin, and to be reprinted in the official report of the Association? The general thesis I there presented was that for centuries and in the early history of this country due process meant merely the fair and ordinary procedure of administering justice, and not the substance of legislation itself; that only very recently was there an extension of its meaning to include the latter point; and that such extension was never clearly defined and finally came to rest only upon the indefinite test of the paramount right of public necessity. My conclusions since they were uttered have been so thoroughly reinforced by the New York Milk Regulation Case, Nebbia v. New York, that less emphasis on this point is now required.

I would reiterate, however, the comparatively recent nature of the doctrine of substantive due process. The English history from Magna Carta down to the present time is clear on the point that is is a procedural concept, and such was the early federal and state history, with but slight exceptions, in this country. It was further the attitude of the Court during the first decades of due process under the Fourteenth Amendment adopted in 1868. In fact, a distinguished leader of this Association, Honorable F. Dumont Smith, whose care for the Constitution is well known, has termed the change in attitude toward the Fourteenth Amendment a "revolution." The first actual decision came as late as 1890 when a Minnesota law failing to provide judicial review of commission rate-making was set aside. But the full implications of the doctrine did not appear until the famous Lochner case in 1905, when a divided court invalidated the New York law regulating hours of labor in bakeries. Many can recall the storm of criticism which this provoked and its reverberations in political campaigns. Not until 1927 in the New York Theater Ticket Brokers Case was a legislative declaration that a business is affected with a public interest set aside, although this decision was foreshadowed in the Kansas Industrial Court Case of 1923. All these decisions are numerically but a small part of the total number of cases where the claim is made, and it is important to note that in each of these the court is careful to weigh the restriction of individual rights against the public need. Thus in the famous Oklahoma Ice Case, Justice Sutherland in holding invalid the regulation of the ice business was forced to distinguish his own opinion shortly earlier upholding regulation of cotton-ginning in the same state. He did it by finding that cotton-ginning was vitally necessary to the welfare of the people of Oklahoma, while the manufacture and sale of ice was not. Whether or not we agree with this distinction, the important point is that the entire court has emphasized throughout that the paramount right of public necessity will justify legislation which may sharply limit the rights of individuals. This winter there have been decided the Minnesota Mortgage Moratorium Case and the New York Milk Case in each of which a majority of the court was willing to find such limitation in situations where at other times it would not have existed. The Milk Case, in particular, is important as clarifying several points, notably that there is nothing inherently unusual in price-fixing as such, and that form of regulation, among others, is permissible where the public interest demands. It also puts into proper perspective the conception of businesses affected with the public interest, a concept used under English law and under our first constitutional decisions as justifying wide regulation but later employed as a limiting device on legislative action. Now this gloss upon the meaning of the phrase is definitely repudiated. And the case also catalogues many and striking examples of permitted regulation and concludes by upholding the *minimum* price requirements of the New York act, a new step in legislative regulation developed under this depression.

With these various precedents in mind, I feel that except for some purely local or intrastate transactions the recovery legislation is due to be upheld. Personally, it seems to me that this is a wise governmental policy. The court is not in a position to exercise leadership in an economic and social emergency. It should not put a stop to attempts of other governmental agencies to do so. Wise consideration for the future standing of the court as well as care for our own political future as a democracy impels to this conclusion. It seems to me, therefore, that the leadership in the profession can well be thrown not to placing impediments in the way of legislative action by raising constitutional barriers of doubtful or debatable validity but by trying to point the way to improvement and better adjustment of the legislative program. I can state my thesis in no better words than those used by Chief Justice White in addressing the American Bar Association in 1914 when he said: "There is great danger, it seems to me, to arise from the constant habit which prevails where anything is opposed or objected to, of resorting without rhyme or reason to the Constitution as a means of preventing its accomplishment, thus creating the general impression that the Constitution is but a barrier to progress instead of being the broad highway through which alone true progress may be enjoined." And he added this pertinent query which I put to you today: "Upon whom does the duty more clearly rest to modify and correct this evil than upon the members of our profession?"

Deaths of Members Reported

The Secretary's office has received notice of the death of the following members:

W. F. Stadtlander, Pittsburgh, Pa., Feb. 20th.

Hon. Sylvester J. Snee, Pittsburgh, Pa., in February.

Edward W. Shelton, New York City, Feb. 14th.

E. H. Randolph, Shreveport, La., in January.

Grahame H. Powell, Washington, D. C., January.

Pat Malloy, Tulsa, Okla.

Isidor A. Landesman, Boston, Mass., Feb. 10th.

George H. Harman, Brooklyn, N. Y., Jan. 6th.

Hon. E. H. Gaither, Harrodsburg, Ky., January.

Frederick W. Brooks, New York City, Jan. 9th.

THE NATIONAL INDUSTRIAL RECOVERY ACT: IS IT CONSTITUTIONAL?

Question of Whether Act Is Valid Exercise of Any Power Conferred by Constitution Must Be Considered not only in Light of Words of the Act but also in Light of Codes Approved under and by Virtue of It, Since These Have Full Force of Statutory Law—Various Constitutional Sources of Power Invoked to Sustain Legislation—The "Spirit Doctrine," "Inherent Sovereignty," "The General Welfare," "Police Power," "Power to Regulate Money," "The Commerce Clause"—Local Activities not Directly Burdening Interstate Commerce Are Beyond Congressional Regulation—Hours of Labor and Rate of Wages, etc.*

By Hal H. Smith
General Counsel, Michigan Manufacturers' Association

BEFORE we begin the consideration of the National Industrial Recovery Act in its relation to the Constitution of the United States we perhaps should clear the ground of one suggestion which has appeared at times in the public discussions. We refer to the suggestion that the Act is only a framework of machinery under which the codes are formulated, and that the codes are, in fact, voluntary agreements and contracts, and can be enforced as such.

The Act does, of course, provide for the formulation and adoption of so-called voluntary codes. But even as to these codes, it is the President's approval that gives them life and authority. They become effectual, not upon the agreement of the members of the industry who adopt them, but upon the approval of the President of the United States. We might very well argue, if it were necessary, that even as to these voluntary codes there have been no free and valid contracts, since industry can agree to nothing to which the President objects. In this view of the matter there is no such thing as a voluntary code. There may be provisions in a certain code which are acceptable to the members of the industry, but the validity of the code itself rests not upon any agreement, but upon the authority of the statute exercised through the President.

However, even these so-called voluntary codes, when approved by the President, are compulsory upon those minority members of the industry who have not agreed thereto. As to these members, there is no contract and no voluntary acceptance. The validity of the regulation, as to them, must find its justification in the Act alone.

But the Act goes much further than to set up an opportunity for industry to agree on its own regulations. It provides not only for the so-called voluntary codes. It provides as well for compulsory codes. There is here no pretense of an agreement, and these compulsory codes must rest upon the authority of the Act and the delegation of that authority to the President.

The Act, however, is not limited to the formulation and administration of the codes. It sets up its own definite mandates and prohibitions. It prescribes certain provisions as necessary in all codes, agreements and licenses, whether promulgated by the President in the absence of action by an industry or voluntarily adopted by that industry. Finally, the codes, when approved or prescribed, are intended to become a part of the law and can be enforced by criminal actions, by fines, by injunctions, and by proceedings under the Federal Trade Commission Act.

We can be assured, therefore, that the Act is not merely a framework within which voluntary agreements can be entered into. On the contrary, it is a Federal statute, imposing regulations by its own terms and through the authority delegated to the President.

Delegation of Legislative Authority

We do not discuss the question of whether or not the delegation of authority to the President of the United States is or is not valid. If not valid, of course, the present Act would fail. The question here would be whether or not Congress has laid down "an intelligible principle to which the person or body authorized . . . is directed to conform." It must lay down the "general rules of action" under which the President must proceed.[1] It might well be argued that the Act does not in Section 1, its preamble or declaration of policy, sufficiently declare such an "intelligible principle" or "such general rules of action." But it is not impossible that Congress could set forth with sufficient definiteness the standard for the guidance of the President to whom the powers of administration and interpretation have been delegated. We have, therefore, preferred to regard this question as not fundamental and decisive.[2]

But whether or not the Act in some respects validly delegates authority, not to the President, but to industry (for instance, in its section 7-b which provides that voluntary limited codes shall have the same effect as a prescribed code under section 3-a), is another question. Granted that Congress can, in a proper

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The writer acknowledges particular indebtedness to Prof. Handler's article, The National Industrial Recovery Act, American Bar Association Journal, Vol. XIX, No. 9, p. 440, September 1933; Some Legal Aspects of the National Industrial Recovery Act, Harvard Law Rev., Vol. XLVII, No. 1, p. 85, and the published address of Hon. Jas. M. Beck.

1. *Field v. Clark*, 143 U. S. 649, 692; *Buttfield v. Stranahan*, 192 U. S. 470, 496; *Union Bridge Company v. United States*, 204 U. S. 364; *United States v. Grimaud*, 220 U. S. 506; *United States v. Cohen*, 255 U. S. 81; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Hampton Jr. Company v. United States*, 276 U. S. 394, 409.

2. An article on the delegation of power is found in 11 *Va. Law Review*, 183.

case and in a proper manner, delegate this authority to an administrative officer, there can be no pretense that it could delegate it in any case to an indeterminate and legally irresponsible group of individuals described as an "industry."

The Application of the Act

We come then to the question of whether the Act is a valid exercise by Congress of any power conferred by the Constitution. That question must be considered not only in the light of the words of the Act, but also in the light of the codes which are approved under and by virtue of the Act, and which, on such approval have the full force of statutory law. For the codes are thus intended to become a part of the law, and the question of constitutionality may depend on how the Act is "construed and applied" by means of the codes.[3]

All these regulations and prohibitions are to apply to interstate and foreign commerce, and to any transaction *affecting* interstate or foreign commerce. This is the language of the statute. However, by the codes and the practical enforcement of the law, every activity or transaction involving the manufacture of any commodity by a trade or industry, whether in interstate or foreign commerce, or in intrastate commerce, or whether such transaction or activity be commerce at all is or may be regulated. Activities not involving production are also included in the operation of the Act. For instance, the labor employed in banks and in outdoor advertising are subjected to its provisions. The regulation directly applies to the activities of business, trade, and industry, without any distinction as to whether they are in commerce, or in interstate commerce or in intrastate commerce, so long as such activities "provide necessary outlets for productive enterprises of a national character."[4] Even purely local activities which do not fall within that limitation are indirectly regulated, since local business is encouraged to formulate both local and national codes which may be approved by the President.

Where, then, is the power that permits these regulations? Where is that authority to be discovered? We quote Chief Justice Taft:—"When fundamental rights are thus attempted to be taken away, . . . we may well subject such experiment to a tentative judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."[5]

The "Spirit" Doctrine

One answer to this question is, that even though the Constitution may contain no words from which authority for this Act can be derived, nevertheless, the Act must be sustained as within the *spirit* of that fundamental law.

It is interesting that in the past this theory has been invoked to protect private rights rather than to justify their regulation and restriction.[6] But there is no merit in this "spirit" contention. One authority has put it this way: "Stated in this abstract philosophical form the doctrine that the spirit of the Constitution is to prevail over its language has no more legal validity than the doctrine of natural law."[7] Just as a law cannot be held to be unconstitutional because it is in conflict with a supposed spirit of the fundamental law, so an act of Congress cannot be sustained by reason of the "general latent spirit" supposed to pervade or underlie the Constitution. The resort to the spirit of the Constitution, either in order to sustain an exercise of governmental power or to impose a limitation which is not provided by the instrument itself, is in essential opposition to the accepted fact that the Federal Government is a government of enumerated and delegated powers.

Inherent Sovereignty

There is still another theory for the validity of the Act other than that it is supported by the language found within the four corners of the Constitution, and that is that some authority exists by reason of Federal sovereignty which would permit the courts to sustain the Act. The argument is that there is an inherent power of sovereignty in the Federal Government over and above and outside of the Constitution. This Recovery Act, it is said, must be sustained as an exercise of that power.

This question of some such power of so-called sovereignty has been often debated, and there are in the decisions, it is true, some dicta which has furnished the basis for the contention that it does exist. But the language in these cases when examined will be found in each instance to be obiter, and the power that was sustained will be seen to have been actually justified as a resulting or implied power.[8] On the other hand, whenever the question has been squarely presented the doctrine of inherent sovereign powers has been emphatically repudiated.

Chief Justice Taney said, "Nor can any argument be drawn from the nature of sovereignty or the necessities of government for self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution. Neither of its branches can exercise any of the powers of government beyond those specified and granted."[9]

This sovereignty theory was pressed upon the court in the case of *Kansas v. Colorado*. But the carefully considered opinion definitely denied it.[10]

If, then, it be said that the mere fact of the existence of the government gives rise to a power in Congress to make laws to preserve it, the answer is that the Constitution itself sets the limit on any such authority. Without conceding that the powers set down in it are inadequate to the preservation of the Federal Government, we can still insist that the fault, if any, can be remedied only by an amendment of the Constitution in the manner which is there provided, and cannot be

3. A statute, in terms constitutional, may be unconstitutional "as construed and applied." *Poindexter v. Greenhow*, 114 U. S. 270; *Kansas City S. Ry. Coal v. Anderson*, 233 U. S. 325; *Willoughby on the Constitution*, Vol. I, 15.

4. Statement of Administrator, General Hugh S. Johnson, February 13, 1934.

5. *Truax v. Corrigan*, 257 U. S. 312, 338, involving the Arizona strike injunction Act.

6. See *Loan Association v. Topeka*, 87 U. S. (20 Wall.) 655, 662, 663, commented on in Willoughby on the Constitution, Vol. I, 68.

7. *Willoughby on the Constitution*, Vol. I, 68.

8. *Willoughby on the Constitution*, Vol. I, 93, citing *Legal Tender Cases*, 79 U. S. (12 Wall.) 457; *United States v. Jones*, 109 U. S. 513; *Church of Jesus Christ v. United States*, 136 U. S. 1; *Fong Yue Ting v. United States*, 149 U. S. 698.

9. *Ex parte Merryman*, Case No. 9487, Fed. Cases; 9 Am. Law Reg. 524; 24 Law Rep. 78.

10. 206 U. S. 46. At page 89: "But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

remedied by any action of Congress over and beyond the authority given it by the instrument under which it was created.

The General Welfare

The first section of the Act indicates that Congress intended to rest it primarily upon the Commerce clause, but reference is made to the "public welfare" and to the "general welfare," and it is now argued that the Act should be sustained as within the power of Congress to legislate for the general welfare of the nation. The words "general welfare" are, of course, found in the Preamble of the Constitution. Its language is familiar.[11] Do these words of themselves confer any authority on the Federal Government? Can they be resorted to to enlarge the powers of that government as they are defined in the Constitution itself? This question ought to be regarded as definitely settled. Mr. Justice Story, in his work on the Constitution, said,[12] "The preamble never can be resorted to to enlarge the powers confined to the general government or any of its departments. It cannot confer any power *per se;* it can never amount, by implication, to an enlargement of any power expressly given." This rule has been accepted without any qualifications by the courts.[13] In *Jacobson v. Massachusetts,*[14] it was said that: "Although that preamble . . . indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its departments."

The words "general welfare" appear again in Section 8 of Article I.[15] Does this section confer any authority to legislate for the general welfare, or must its meaning be restricted to confer upon Congress the "Power to Lay and collect Taxes, Duties, Imposts and Excises," only "to pay the Debts and provide for the Common Defense and for the general Welfare of the United States?" Here again we are left in no doubt. Mr. Justice Story made it entirely clear that the words "general welfare" as used in this section must be construed to be connected with the power to lay taxes, duties, imposts and excises, so as "to constitute a qualification upon them," and that they do not refer to, nor can they extend to any other power. He points out in language that cannot be misconstrued that if these words "for the common defense and general welfare" refer to a distinct and substantial power other than that to lay and collect taxes, then "it is obvious that, under color of the generality of the words 'and provide for the common defense and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.[16]" He concluded that the general welfare clause contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the power of taxation.

11. "We, the People of the United States in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

12. Commentaries on the Constitution, 4th Ed., Vol. I, Sec. 462.

13. *Yazoo and Miss. Valley R. R. v. Thomas,* 132 U. S. 174, 188.

14. 197 U. S. 11, 22.

15. That section reads: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

16. Commentaries on the Constitution, 4th Ed., Vol. I, Chapter XIV.

See also remarks of Mr. George Nicholas in the Virginia Convention, Elliot's Debates, Vol. 3, p. 442-3.

The Police Power

We must not confuse this theory that some authority for the Act exists in the Federal government by reason of the reference to the general welfare either in the Preamble or in the Constitution itself, with the accepted doctrine that the states can legislate for the general welfare and the public interest by reason of their so-called police power.[17] The two theories are quite distinct. The police power belongs to the states, and was never delegated to the national government. It was not surrendered by the states. It originally, and always belonged to them. It is not "directly restrained by the Constitution of the United States," and is "essentially exclusive."[18]

For this reason the opinion in the Nebbia[19] case with its new definition of the phrase "affected with the public interest,"[20] and its expansion of the field of state regulation under the police power, gives no support whatever to the claim that the Recovery Act is valid as an exercise of that power. The opinion may emphasize the so-called liberal attitude of the majority of the court, and undoubtedly does reduce to a minimum the opportunity for the successful defense of private and individual rights against the regulatory action and the whims of law-making bodies of the states. But it does not prophesy that the Supreme Court of the United States will read new powers into the Federal charter or ever hold that the Federal government has or can exercise the police power belonging to the several states. The very fact that the court upholds the police authority of the state to the extreme extent of the fixing of prices under the Milk Law, suggests that it will not uphold Congress in its excursion into this same field, always reserved to the states, and now so greatly enlarged and expanded.

The Power to Regulate the Value of Money

It has also been urged[21] that the Act can be supported, at least in part, as within the power of Congress because the Constitution in subdivision 5 of Section 8 of Article I gives Congress power "to coin Money, regulate the Value therof, and of foreign Coin, and fix the Standard of Weights and Meas-

17. We use the term "police power" in the restricted sense as referring to the power reserved to the several states to legislate for the promotion of the public welfare and not in the more general sense in which all the power necessary to maintain national existence, maintain justice and to promote the public welfare are included with the term. "The exercise of the police power for the protection of safety, order and morals constitutes the police in the ordinary or narrower sense of the term." *Freund, The Police Power,* par. 10.

In the broader sense the Federal Government exercises a police power in regulating commerce and in certain other respects, but this "Federal exercise of the police power through positive regulation rests upon the enumerated powers of Congress under the Constitution." *Freund, The Police Power,* par. 65.

18. See *Glenn v. Southern Exp. Co.,* 170 N. C. 2, 86; L. R. A. 1918 B, 428; *United States v. DeWitt,* 9 Wall. 41; *New Orleans Gas Light Co. v. Louisiana Light, etc. Co.,* 115 U. S. 650; *Wilkerson v. Rohrer,* 140 U. S. 545; *Plumley v. Com. of Mass.,* 155 U. S. 461; *United States v. E. C. Knight Co.,* 156 U. S. 1; *Cooley's Constitutional Limitations,* Vol. 2, 8th Ed., p. 1222.

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizens of rights guaranteed by the Federal Constitution."

The language used by Chief Justice Taft in *Brooks v. United States,* 267 U. S. 432, 436, (1924) does not indicate any different view than is stated by Cooley and the cases above cited. His reference to the police power clearly refers to the police power in the general sense as defined by Freund. Mr. Justice Brandeis in *Hamilton v. Kentucky Distillers Co.,* 251 U. S. 146, 156, (1919) had stated the rule with more accuracy and more discrimination.

19. *Leo Nebbia v. The People of the State of New York,* decided March 5, 1934, U. S. Sup. Ct.

20. See *Williams v. Standard Oil Co.,* 278 U. S. 235.

21. Mr. Donald Richberg before Cleveland Bar Association. The United States Law Week, Vol. I, No. 11, November 14, 1933.

22. The meagre reference to this clause in the Federalist No. XI.I gives no indication of any theory of any power to fix wages. There is no record of such a doctrine in any debate or discussion in the Convention itself.

ures."[22] It is argued that Congress, being authorized to coin money and regulate the value thereof, can regulate the rate of wages and hours of labor, since their value is measured in money. It is not suggested that restrictions on the expansion of plant facilities, limitations on the area in which goods can be sold, and a rule that goods cannot be sold for less than cost, could all be imposed by congressional authority as within the power to coin money and regulate the value thereof. Yet this suggestion would be as reasonable as the other.

The legislation enacted under this power furnishes proof that the words "regulate the value" have always been construed to mean the fixing of the nominal value, the designation of value, the stamping of the coin, and not in any sense to the determination of what the owner of the coin may expect to procure therefor.[23]

The *case of Fox v. State of Ohio,*[24] contains some pertinent language. The court said: "We think it manifest that the language of the Constitution by its proper signification, is limited to the facts, or to the faculty in congress of coining and of stamping the standard of value upon what the government creates or shall adopt. . ."

One searches the books in vain to find any trace of the theory that under the authority lodged in Congress "to coin money and regulate the value thereof" Congress would have to fix the relative value of wheat or corn, or a day's labor.

Why indeed should we stop at wages? The dollar's exchange value is measured and known through its power to purchase, not wages alone, but every commodity and every service. If the power to regulate the value of the money is to be extended to the regulation of the value of the work that is given for a unit of money, then Congress may under this power regulate the value of every other thing that is exchanged for money. This, of course, is *reductio ad absurdum.*

The Commerce Clause

We come now to the argument that the Act can be sustained as within the Commerce clause of the Constitution.[25] The definition of commerce is not set down in the Constitution, but the fact that it consists of every species of commercial intercourse has been repeatedly recognized. It is more than traffic, it is intercourse.[26] It has been held to embrace navigation, communication, traffic, transit of persons, and the transmission of messages by telegram. It might be said that it includes intercourse without any qualifying adjective whatever. But it certainly includes nothing that is not intercourse or connected with intercourse. It has never been held to include transactions in which intercourse was not present, or which are not directly associated with intercourse.

In following this definition the court has in many cases drawn the distinction between commerce and what was not commerce, and between commerce and manufacture, and mining, and many other activities. It is said that manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and transportation incidental thereto constitute commerce.[27] Thus the court has said that commerce succeeds to manufacture, and is not a part thereof.[28] Mining, generating electricity, oil production, the advertising business are not commerce. We do not need to multiply illustrations.[29] In some of these many cases the transaction or business under consideration was held not to be interstate commerce, but in all of them it is clear that the real distinction being drawn was between what is commerce of any character and what is not commerce.

The rule to be deduced from these cases is plain. An activity or a transaction which is not ordinarily commerce cannot be regulated under the Commerce clause unless it is so associated with interstate or foreign commerce as to be a necessary and integral part thereof, or, as it is sometimes said—within the stream of that commerce—or unless it affects such commerce to the extent that it becomes a burden thereon.

The activity of producing a manufactured article (and this includes hours of labor, wages, working conditions and the organization for collective bargaining) which eventually may be shipped in interstate or foreign commerce, cannot be regulated because such manufacture has not yet become a part of that traffic and intercourse. Trading in cotton futures cannot be regulated because the cotton may not in the future be moved in interstate commerce.[30] A product that has moved in interstate commerce and has finally come to rest in the hands of the consumer is not subject to such regulation.[31] In a word, if the activity is commerce between the states, or an integral part thereof, or necessarily associated therewith, or in the stream thereof, or if it cannot be practically separated therefrom, or is a burden thereon, it is regulated as a part thereof, but if it is otherwise, it cannot be regulated.[32]

All of this was summed up in the case of *Hammer*

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23. Beginning with the first coinage Act, that of April 2, 1792, the reference is to denominations, "nominal" value, "legal" value, "denomination and legal" value, and "designation of value." These phrases define the sense in which the words "regulate the value" were used in the Constitution.

In the Act of January 18, 1837, dollars were made legal tender according to their "nominal" value, (Sec. 9) and it was directed that on each coin there should appear "a designation of the value of the coin." (Sec. 13) In the Act of March 3, 1849, eagles "were to be of the value of twenty dollars or units." (Sec. 1) by the Act of March 3, 1851, a three cent piece was provided "as a piece of the denomination and legal value of three cents." In the Act of February 4, 1853, the reference is to coin of a "nominal value." (Sec. 3).

24. 5 How. (U. S.) 410, 433 (1846).

25. Section 8 of Article I. "Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

26. *Gibbons v. Ogden,* 9 Wheaton, 186. For definitions of commerce, see Prentice and Egan, Commerce Clause of the Federal Constitution, p. 48.

27. *Kidd v. Pearson,* 128 U. S. 1, 20; see also discussion in Calvert, Regulation of Commerce, at p. 117.

28. *United States v. E. C. Knight Co.,* 156 U. S. 1, 13; *Crescent Cotton Oil Co. v. Mississippi,* 257 U. S. 129.

29. A distinction has been drawn between the manufacture of oleomargarine and its sale in interstate commerce, *Capital City Dairy Co. v. Ohio,* 183 U. S. 238; and it has been said that ore did not enter commerce until "after the mining is done"; *Oliver Mining Co. v. Lord,* 262 U. S. 172. Coal mining is not commerce; *United Mine Workers, etc. v. Coronado Coal Co., et al.,* 259 U. S. 344; *D. L. & W. Railroad Company v. Yurkonis,* 238 U. S. 439. The generation and conversion of electricity has been held to be local, and commerce therein did not begin until conversion was ended; *Utah Power & Light Co. v. Pfost, et al.,* 286 U. S. 165. The production of crude oil is not a part of commerce; *Champlin Refining Company v. Commission,* 286 U. S. 210. The business of giving exhibitions of baseball was held not to be commerce; *Federal Baseball Club v. National League,* 259 U. S. 200. The advertising business was held to be local and not interstate commerce; *Blumenstock Bros. etc., v. Curtis Publishing Co.,* 252 U. S. 436. Sales of cotton for future delivery where there was no obligation to ship from one state to another were held not to be interstate commerce; *Ware and Leland v. Mobile Co.,* 209 U. S. 405. The business of soliciting and selling insurance contracts was held not to be commerce; *Paul v. Virginia,* 75 U. S. (8 Wall.) 168; *New York Life Insurance Co. v. Deer Lodge County,* 231 U. S. 495. Labor agents hiring persons to work in another state were held not engaged in interstate commerce; *Williams v. Fears,* 179 U. S. 270. The business of conducting a cattle exchange and stock yards was held not to be commerce, or, at least, not interstate commerce; *Hopkins v. United States,* 171 U. S. 578. Packing houses were held not engaged in commerce; *United States v. Beyer,* 85 Fed. 425. And, as was said in the *Northern Securities Case,* 193 U. S. 197, while the Federal authority cannot assume control of the mere manufacture or production of articles and commodities within the limits of the states, it can reach out and declare illegal every *contract* which directly or necessarily operates in restraint of trade or commerce among the several states. But here it was commerce itself which was the object of the contract.

See also *United Leather Workers v. Herbert,* 265 U. S. 457, and the cases there reviewed.

30. *Ware & Leland v. Mobile Co.,* 209 U. S. 405.

31. *Greater New York Live Poultry Chamber of Commerce v. United States,* 47 Fed. (2d) 156; Minnesota v. Blasius, 290 U. S. 1.

32. Perhaps in no case has there been a narrower distinction and, therefore, a better illustration of its importance, than in *Edelman v. Boeing Air Transp.,* 289 U. S. 249, where a state tax on the "use"

v. Dagenhart.[33] It has been objected that this is a "five to four" opinion. But those who made this objection do not since the Blaisdell and the Nebbia decisions stress it so strongly. In this case the court sustained the proposition that in regulating commerce, Congress regulates traffic in things, vehicles of transport and things *in transitu*, but not the things themselves. Before and after the *transitus* they are beyond this power of regulation. The production and use of things in the terminus *a quo* and the terminus *ad quem* are not subjects of the commerce power, but of the state from which or to which they are transported. It was there insisted that commerce began when actual delivery was made to the carrier for transportation. It could not be determined by the character of the commodity nor the intention of the owner. And it was concluded that a regulation of the hours of labor of the children in factories belonged purely to the state authorities. This employment being entirely separate from commerce could not be reached under the Commerce clause. Finally, it was held that the regulation in question was not within the Commerce power and to uphold it under that power would destroy "all freedom of commerce" and eliminate the "power of the States over local matters," . . . "and thus our system of government would be practically destroyed."[34]

It is significant that in his dissenting opinion in this case, Mr. Justice Holmes used these words: "The objection urged against the power is that the states have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling, I agree to it, and suppose that no one denies it."[35] There could be no better illustration of direct intermeddling than that which is contained in the Industrial Recovery Act and the codes which have been framed under it.

One cincture, then, which the Constitution has drawn around this power of Congress, can be defined by this word "commerce." Congress can regulate interstate commerce, but it cannot, so far as this clause of the Constitution is concerned, regulate anything that is not commerce.

But, of course, it is only interstate and foreign commerce that Congress can regulate. It is not given authority to foreclose the states in their exercise of the police power in respect to intrastate commerce, and the grant of authority over purely Federal matters was not intended to destroy the local power always exercised and carefully reserved to the states. This rule is so familiar that we do no more than to state it. It has been repeated many times. This, then, is the second barrier to Federal regulation as far as this Commerce clause is concerned. It is limited in its authority to *interstate* and foreign commerce.

But the power to regulate draws to it the power to enact appropriate legislation for its protection and advancement, and Congress can reach intrastate commerce when it finds it interwoven and intermingled with or a burden on interstate commerce.[36] It can compel reports from carriers of both interstate and intrastate commerce.[37] It can reach discriminatory intrastate rates when made by interstate carriers.[38] It can prevent a state regulating intrastate instrumentalities which are used in interstate commerce.[39] In a word, it can reach intrastate commerce, "to the extent of maintaining efficient regulation of commerce under the paramount power of Congress."[40]

But in all of these cases where the court has sustained the Federal regulation of some activity or object, which, taken by itself would be intrastate commerce, it has been on the theory that such regulation was necessary or proper to the enforcement of the general authority over interstate commerce, and the court has been careful to point out the direct relation between interstate commerce and the intrastate object of the regulation. Through all these cases runs this clear doctrine: Federal regulation under this commerce clause cannot go beyond interstate commerce and that which is a part of it and that which, though intrastate in character, must be subject to the Federal regulation, else that power over interstate commerce is ineffective and incomplete. And to bring an activity not a part of interstate commerce or directly related thereto within the power of Congress, it must burden interstate commerce. It must "directly and unduly obstruct the free flow of interstate commerce."[41] A remote and incidental effect upon interstate trade is insufficient.[42] It must be more than "accidental, secondary, remote or merely probable."[43] This rule has been repeated by the Court in many cases.[44]

The Recovery Act as it is written does not put any different interpretation on the power of Congress. In Section One (1) it speaks of an emergency which "burdens" interstate and foreign commerce, and of "obstructions to the free flow" of that commerce.

When, therefore, in the succeeding sections[45] it uses the words "in or affecting interstate or foreign commerce," those words must mean "affecting" in the sense of obstructing or being a burden on that commerce.

But in any event, the fact that the Act uses the words "affecting interstate or foreign commerce" adds nothing of power. The statute cannot enlarge the Commerce clause.

Nor has Congress the power to declare that the

of gasoline in withdrawing it from the tanks and placing it in the plane was sustained on the theory that that "use" was not a part of interstate commerce.

33. 247 U. S. 251.

34. Note: For an able review of *Hammer v. Dagenhart*, see "Interstate Commerce and Child Labor," A. A. Bruce, 3 Minn. L. R. 89. See also *Brooks v. U. S.*, 267 U. S. 432.

35. 247 U. S. 277.

36. *United States v. New York Central*, 272 U. S. 457.

37. *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194.

38. *Shreveport case*, 234 U. S. 342.

39. *Minnesota Rate Cases*, 230 U. S. 352.

40. *Railroad Commission of Wisconsin v. C. B. & Q. R. R.*, 257 U. S. 563; *United States v. Louisiana*, 290 U. S. 70, 75; also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211.

So in *Swift & Co. v. United States*, 196 U. S. 375, local incidents of interstate movement which, taken alone, would be intrastate in character, were not treated as intrastate, but were treated as a part of the stream of interstate commerce. This was said in reference to the business of buying, shipping, and converting live stock. The current of commerce into the stock yards being interstate in character, it was held to include the subordinate activities and facilities which were essential to that movement; *Stafford v. Wallace*, 258 U. S. 495. The same principle was applied to the delivery and sale of wheat to local grain elevators; *Lemke v. Farmers Grain Co.*, 258 U. S. 50. In the case of *Hill v. Wallace*, 259 U. S. 44, which dealt with local deals on boards of trade in grain or future delivery, but which grain would not necessarily move in interstate commerce, it was held that such transactions were not within the commerce clause. The same rule was applied to the regulation of the Chicago Board of Trade in its transactions in grain; *Chicago Board of Trade v. Olson*, 262 U. S. 1. The same rule was also applied to a shipment of poultry, which was held to remain in interstate commerce until sale by the receivers thereof to the marketmen; *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 Fed. (2d) 156. Natural gas was held to continue to be in interstate commerce until delivery to the customers, although foreign and local gas were mingled in the pipe lines and the title to the interstate gas had passed at the state line; *Peoples' Natural Gas Company v. Public Service Commission*, 270 U. S. 550. Even where there may be an intermediate delivery of the product, but which did not end and was not intended to end the interstate movement of the commodity, it was held that the movement was merely halted "as a convenient step in the process of getting it to its final destination," and so the commodity was still in interstate commerce; *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291.

41. *Industrial Ass'n. of San Francisco v. United States*, 268 U. S. 64.

42. *Penn. Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254.

43. *Swift & Company v. United States*, 196 U. S. 375.

44. *Minnesota Rate Cases*, 230 U. S. 352, 410.

45. Sections 3 (b), 4 (a), 4 (b).

subject of any regulation is a part of interstate commerce.

In the Revenue Act of 1916, Congress made clear its purpose to consider stock dividends as income. It was argued that they were not income[46] and, therefore, could not be taxed as such. The court said:

"Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution from which it alone derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

The words of the Act and its practical interpretation are, however, two different things. Its operation, as we have already pointed out, has been extended to all industrial activity and it is defended on the ground that every such activity "affects" interstate commerce. That every act of every kind is, in some remote and tenuous way, related to commerce may be admitted.[47] That every industrial activity "affects" it cannot be proven.

Nor do all the activities and details of production and manufacture such as, for instance, fixing certain rates of wages, employment for 48 hours a week instead of 36, the refusal to employ members of a union, burden interstate commerce or directly obstruct it. Primarily, and in the broadest sense, they are concerned in creating the objects of interstate commerce. Such a detail may *lessen* the amount of interstate commerce, but it does not burden it. It is separated from it. The automobile manufacturer may refuse to continue operations. The retail store may close its doors. This may possibly affect interstate commerce, but does not burden it or obstruct it.

In no way, then, can we reach the conclusion that *all* these things can be regulated by Congress, except by the broad assertion that not only every activity which is not commerce, but as well every local activity in commerce is, in effect, a part of interstate commerce. But that is not the meaning of the Constitution. The Commerce clause clearly contemplates the distinction between that which is commerce and that which is not commerce, and between that which is local and that which is interstate commerce. If the activities of production are on this theory to be regulated, intrastate commerce and that which is not commerce, and all state regulation thereof, will be swallowed up in the Federal power. This cannot be. So long as the Commerce clause stands, there must be a line of demarcation beyond which the power of Congress cannot go. Activities not directly related to interstate commerce and not a direct burden on it are beyond the Federal authority. Let us concede that the complexity of modern business has drawn into the stream of interstate commerce much that was not heretofore considered as directly related to it. Nevertheless, the barrier still remains. Congress cannot reach that which is not commerce nor a part of it. That which is local and that which is not a direct burden on that commerce, by the plain words of the clause, are not within its power.

How, then, can the National Industrial Recovery Act justify under the Commerce clause the regulation of hours of labor and wages in a retail store, a manufacturing establishment, a mine, office building, street railway, oil well, laundry, restaurant, or hotel? How can it impose its regulations on that which is not commerce and on that which is not interstate commerce? It perhaps can reach labor in the stock yard, railroad warehouse, or interstate truck line. But clearly, unless the local activity is a part of, in the stream of, or commingled with, or definitely associated with the interstate commerce movement, that activity cannot be reached by the Federal government under the Commerce clause.

Regulation of Hours of Labor and Rate of Wages Separately Considered

In this view of the question we do not need to devote our attention particularly to the provisions of the Act and the codes which regulate hours of labor and rates of wages. If the general power of regulation does not exist, obviously, these regulations are void as to any industry beyond the scope of the interstate commerce power.

However, we perhaps should not pass without notice the case of *Wilson v. New*,[48] sometimes cited as directly sustaining the power of Congress to regulate wages. The specific exercise of that power was there upheld, but it was clearly put on the ground that the statute in question, the Adamson law, dealt with interstate carriers. While it was said that the business of carriers by rail was a public business the decision rested squarely on the power to regulate interstate commerce. The words of the court are, " . . . Engaging in interstate commerce subjected the carrier to the power of Congress to regulate." But the regulation was even then sustained only as a temporary measure and until the parties could agree themselves. Their right to contract, one with the other, was expressly recognized and preserved.[49]

This question came up again in *Adkins v. Children's Hospital*,[50] where the Act of Congress fixing minimum wages for women and children in the District of Columbia was examined. This Act was, of course, defended as within the police power which the Federal government has over the District. But it was held invalid. Wilson v. New was distinguished, and it was said, "To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it, for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

Later, at the same term, the court handed down the opinion of *Wolff v. Industrial Court*.[51] The Industrial Court in Kansas had made an order fixing wages in the Packing Company. Chief Justice Taft reviewed the cases that dealt with the question of what industries or trades were "clothed with the public interest." He pointed out that even though a business was clothed

46. *Eisner v. Macomber*, 252 U. S. 189; *Towne v. Eisner*, 245 U. S. 418; also *Adkins v. Children's Hospital*, 261 U. S. 525, 544.

47. See *Veazie v. Moor*, 20 U. S. 845, 14 How. 571 (1852). The state law granted an individual exclusive right to navigate the upper waters of the Penobscot River lying wholly in Maine, not forming a part of any continuous track of commerce between two or more states. It was held not repugnant to the Constitution. It was argued that the law and the privilege conferred were in derogation of the power vested in Congress by the Commerce clause. The court said:

"Nor can it be properly concluded, that because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately became the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned."

48. 243 U. S. 332.

49. See also *Wolff Packing Company v. Industrial Court*, 262 U. S. 522, 541, 544.

50. 261 U. S. 525.

51. 262 U. S. 522.

with the public interest and some regulation thereof would be permissible, it did not necessarily follow that wages therein could be regulated, and said, "If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be revolution in the relation of government to business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similar and extreme contention. Civil Rights cases, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment." " . . .It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate commerce carrier in the presence of a nationwide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us."

These cases clearly establish that, even if, by some legerdemain, Congress shall be held to have this police power in the states, nevertheless, it does not necessarily follow that in a given industry wages can be regulated by it.

Union Membership and Collective Bargaining

So also the conclusion which we have reached, that the National Industrial Recovery Act can find no safe refuge in the Commerce clause or in the other clauses of the Constitution, makes unnecessary any extensive consideration of that particular clause of the Act. (Sec. 7-a), the effect of which is, to prevent an employer refusing to employ a wage-earner if he be a member of a labor union, and which would also prohibit the employer from requiring that a prospective employee should join the so-called "company union." The Supreme Court, in the Adair and Coppage cases, settled the law as to any restrictions such as these.[52] The right of the employer and the employee to freely bargain and contract is there set forth in terms that cannot be mistaken or evaded. In the Adair case it was upheld even against an Act of Congress and as to an employer engaged in interstate commerce. It was declared that the power in Congress to regulate interstate commerce could not be exerted in violation of any fundamental right secured by other provisions of the Constitution. It was asserted that it was "not within the functions of the government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person against his will, to perform personal services for another." The Coppage case condemned a state statute which declared it a misdemeanor for an employer to require an employee to agree not to become or remain a member of a labor organization during the time of the employment and held it repugnant to the "due process" clause of the Fourteenth Amendment. In both these cases it was repeatedly pointed out that it was a part of each man's civil rights "that he be at liberty to refuse business relations with any person whomsoever, whether the result rests upon wisdom, caprice, prejudice or malice."

It was conceded, however, that a limitation on this right was found in the police powers of the "existing sovereignty of each state in the union." Let us assume, though we do not concede, that now there is some new relation between freedom of employment and the public welfare. Even so, the Recovery Act in this respect cannot stand. As we have already pointed out, there is no question here of the police power. That Act is not a state statute.

Unfair Methods of Competition

The codes, with but few exceptions, contain provisions forbidding unfair methods of competition, and the detail of those methods include too familiar examples of unfair trade, such as deceitful advertising, bribery of employees, secret rebates and commissions, and other devices of unfair trade that have been more or less practiced and have been universally condemned by the law. The repetition of these prohibitions adds but little, if anything, to the law as it stands outside the N. R. A. A remedy for these wrongs has always existed of which the injured industry or competitor could avail himself.

But insofar as these codes include as an unfair method of competition something that is not in the ordinary acceptance of the meaning of the word "unfair"—there is a grave question as to their validity. Granted that it is impossible by definition to include all unfair methods and that "new and different practices must be considered as they arise in the light of the circumstances in which they are employed," nevertheless, the problem of what is unfair is still left to the courts. They have not yet declared any practice to be unfair if it was not in some sense unscrupulous or unfair in the normal meaning of these words.[53]

The clause in the codes which prohibits sales below cost[54] and the open price provision[55] are clearly an attempt to brand as unfair that which is fair. Not by any stretch of the imagination can mere selling below cost be brought within the normal meaning of the word "unfair." There is in it no element of fraud or misrepresentation or unscrupulousness. It does not

52. *Coppage v. Kansas*, 236 U. S. 1, 18, 19. "An evident and controlling distinction is this: that in those cases it has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of levelling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

53. *Federal Trade Comm. v. R. F. Keppel & Bros. Inc.*, U. S. Sup. Ct. February 5, 1934.

" 'Unfair methods of competition' is usually considered not to include practices, which although lowering the standards of an industry, or injuring the public, did not work direct economic hardship upon real or potential competitors."

Sinclair Refining Co. v. Fed. Trade Comm., 276 Fed. 686; *aff'd.* 261 U. S. 463; *Fed. Trade Comm. v. Raladam Co.*, 283 U. S. 643; *Kinney-Rome Co. v. Fed. Trade Comm.*, 275 Fed. 665; *Standard Oil Co. v. Fed. Trade Comm.*, 283 Fed. 81; aff'd. 261 U. S. 463; *Northam Warren Corp. v. Fed Trade Comm.*, 59 Fed. (2d) 196.

54. Of 144 codes accepted or waiting acceptance February 1, 1934, 120 provide against selling below cost.

55. See the Electrical, Petroleum and Iron and Steel Codes as examples.

56. As to price regulation in general, see *Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253, and cases there cited.

Selling below cost is not condemned by the Federal Trade Commission Act, *Sears Roebuck & Co. v. Federal Trade Comm.*, 258 Fed. 307. "We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

discourage competition. On the other hand, it encourages it.[56]

The Emergency Doctrine

The words of the Constitution thus raise an effective bar against this legislation. If the Act is to stand, the Constitution must either be forgotten, or amended, or interpreted to mean something else than it has heretofore meant. It is not proposed that it be amended. There are, we hope, not many who would deliberately ignore it or who would tear it up and discard it. There are, however, some who would read new meanings into it. They justify their efforts in this respect, and the National Industrial Recovery Act, by the so-called "emergency" doctrine, upon the theory that the provisions of the Constitution can be expanded by construction in a period of emergency to permit the regulation imposed by the Act.[57]

We do not need to explore this argument to any great length. We might with some reason ignore it because it is now proclaimed that the Act must remain a permanent part of our law after the emergency has passed and irrespective of it. Nevertheless, the Act is, by its terms, an emergency statute, and will doubtless be so defended in the courts.

The emergency theory has been dealt with by our highest court, and has now, in the case of Home Building and Loan Association, been restated in the opinion of Mr. Chief Justice Hughes insofar as it was necessary to deal with it in connection with a state statute enacted under the state's police power.[58] It was discussed also by the dissenters in the Nebbia case. But the majority opinion in that case gave it scant attention. That opinion rests upon the broad ground that the state's police power is sufficient at all times, emergency or no emergency, to support the legislation there in question.

Upon the general question of whether an emergency creates power the Home Building & Loan opinion is particularly explicit. It declares again the established doctrine of the court that "an emergency does not create power; an emergency does not increase granted power or remove or diminish the restrictions imposed upon the power granted or reserved."[59] This ought to be enough to dispose of the argument that the emergency has given rise to some power particularly appropriate in the defense of the National Industrial Recovery Act. But there is more in the opinion.

The Chief Justice carefully points out that it is only as to certain clauses of the Constitution that we can resort to construction, and, in that process, define their meaning, that is, in the light of an emergency, determine whether the power possessed includes its exercise in respect of particular conditions. It is said that this could be done as to general clauses, but could not be done as to specific clauses. He illustrated specific provisions by several references, for example, Section 3 of Article I of the Constitution, which provides that the Senate should be composed of two senators from each state. On the other hand, he said that the contract clause was general and the process of construction is essential to fill in the details.

The contract clause contained in paragraph 1 of Section 10 of Article I is, of course, a limitation upon the power of the states. As the opinion says, "it leaves undefined the meaning of the word 'contract' or the obligation of contract. It leaves unsettled the 'residuum' of power left in the states 'in relation to the operation of contracts to protect the vital interests of the community.'" Is it an absolute prohibition? The Chief Justice says no—it is not absolute. There is a residuum of power in relation to the operation of contracts, within which is the right to temporarily restrain their enforcement.

The language of the Constitution—"The Congress shall have power . . . to regulate commerce with foreign Nations and among the several states . . ." etc., confers upon Congress a power which is plenary and exclusive. But by the very words of the Constitution, Congress is without authority over intrastate commerce, or over activities or transactions which are not commerce. In this respect it is specific. We may need to define interstate commerce. But with that definition fixed there is no doubt or ambiguity as to the meaning of the clause, and consequently there is no room for further construction. No emergency can read into the clause an authority which the framers of the Constitution saw fit to exclude—a power to control, as to that which is not interstate commerce, the rates of pay, hours of labor, collective bargaining, control of prices and the many other things regulated in the Act and in the numerous codes which have been framed under the Act.

Conclusion

Where, then, is the power for this multiplicity of control of industry, great and small, its wages, its hours of labor, its prices, its freedom? Not in the so-called "welfare clause" of the Constitution; surely not in the "money clause"; not in the police power of the states. It cannot exist in the so-called "spirit" of that document. The "spirit" which is evoked by those who promote this excessive regulation is but the reflection of their own hopes. The emergency adds nothing to sustain the Act. There was no such power in Congress before. There can be none now. The Commerce clause cannot be enlarged to sustain it, nor can those things not embraced by the words of that clause be brought within it by legislative fiat.

And how essentially foreign is the very theory of this regulation to all the fundamentals of the relation between the Federal government and the several states. As expressed in this National Industrial Recovery Act, it destroys the powers of the states to order their own affairs. That very power reserved by the states, which, in the recent decisions, was held to sustain the Minnesota emergency mortgage moratorium and the New York Milk law, disappears, trampled under the feet of this new authority.

Our inquiry was not directed to the economics of

(*Continued on page* 318)

57. The *Rent cases*, i. e., *Block v. Hirsch*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242, have been urged as authority for the argument that in an emergency public interest attaches to new businesses and new objects. But it is not entirely clear that these Rent cases rest upon the theory of an extension of police power in an emergency. It was later argued in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, that the principle involved in these cases was not that of police power but that of eminent domain. The language of the opinion in that case would seem to justify this distinction, even though Justice Hughes in the *Home Building & Loan Association case*, commenting on *Block v. Hirsch* and the other Rent cases, refers only to the police power. It is significant that the majority opinion in the Nebbia case looks for no support in the Rent cases, and that the minority opinion, following the Pennsylvania Coal Company case, again carefully limits their application.

58. *Home Building and Loan Ass'n v. Blaisdell*, 54 Sup. Ct. Rep. 231, decided Jan. 8, 1934.

59. *Ex parte Milligan*, 71 U. S. (4 Wall.) 2, 120. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

ESSENTIAL FACTORS IN DETERMINING CONSTITUTIONALITY OF RECOVERY ACT

Constitutionality of Any Statute not to Be Measured by Mere Yardstick Method but Purpose and Effect of Legislation and Conditions Which Brought It Forth Must Be Considered—Interstate Commerce Clause the Real Source of Power—Recovery Act, with Exception of Labor Clauses, Simply Provides Effective Machinery to Carry out Cooperative Efforts of a Group—Direct Effect on Interstate Commerce of Codes Adopted by Manufacturers, Distributors and Retailers—Labor Policy of Act Explained — Real Accomplishments to Date, etc.*

By David L. Podell
Member of New York Bar; Co-Author of National Industrial Recovery Act

MR. CHAIRMAN and Gentlemen of the Committee: I certainly want to, at the very outset, endorse the excerpts that my learned friend has quoted to you from the opinions of Judge Holmes and others, in the course of the presentation of the very illuminating address that we have just listened to.[1]

I have always felt and it will probably be agreed, that the constitutionality of any statute cannot be measured by a yardstick. You cannot ignore the purpose of the legislation. You cannot ignore the effect of the legislation. You cannot just confine yourself to the bare question: Does this piece of legislation fit into the four corners of the Constitution? without considering the purpose of the legislation, the effect of the legislation, the conditions that brought it forth, whether they be of an economic, political, or social character.

Of course, the Preamble to the Constitution isn't the source of power, nor is the coinage clause. The real source is the power of Congress to regulate interstate and foreign commerce—the commerce clause, but when my learned friend treats this situation from the strict viewpoint of what has been held to be commerce and not commerce, or intrastate commerce or interstate commerce, I say with the greatest respect that he is ignoring the very essence of this type of legislation; not that those standards are to be discarded, nor are they to be ignored, but they are to be applied to this legislation in the light of the entire background.

Now concretely, what do I mean? It is provided here, and I think it has been repeatedly said, that the only substantive law that is contained in the Recovery Act, the only definite declaration of policy, is to be found in the labor clauses; that the rest of the Act provides a piece of machinery to facilitate the doing of something; the doing of what? Effectively to carry out the cooperative effort of a group.

What is there in the Constitution of our land that prevents groups from cooperating? What is there in the cooperation that groups may indulge that inveighs against the Constitution or any clause thereof? There is not a thing in the Constitution. There's something in the statutes. There is one statute which has been on the books since 1891 and which has been repeatedly assailed in recent years before this very Committee by many eminent members of the Bar, as being vague, uncertain, and unworkable—the Sherman Anti-Trust Law and all the legislation that came along after it.

Now, if Congress had the power to enact that type of legislation to put a curb on group activity, it certainly has the power to modify or amend or qualify that very piece of legislation and to what extent does The Recovery Act qualify those statutes?

It says, if a group of merchants in any industry or any subdivision of an industry desire to come together and act cooperatively, so long as their agreements or arrangements do not tend to monopolize or so long as the group does not indulge in monopolistic practices, so long as their agreements are not oppressive to the small merchant, and presumptively so long as they don't inveigh against the existing law, they may come together, they may cooperate. To eliminate the doubt that for years has hung over any business groups in their efforts to come together, the government under the Recovery Act declares to the group: "Formulate what you want to do; submit it to us. We will check it in advance and we will either approve or disapprove it, or possibly modify it to a point where it will come within the four corners of the law." Whatever we approve may be exempt from the restrictions of our Anti-Trust Laws.

Now, when you view this situation not in the light of any one member of the group in any one section of the country, but rather as a combination, as the law has always viewed situations of like character, how can you then escape the proposition that interstate commerce is necessarily involved?

Invariably when you take any one of these combinations you will find incorporated within them a group of manufacturers, a group of distributors, a group of retailers. They are all organized to formulate this one code. Is there anyone who has followed the situation who is prepared to say

*Address delivered at the meeting of the Committee on Commerce of the American Bar Association in New York City, April 11, 1934. Mr. Podell spoke extempore and his remarks are taken from the official stenographic report of the meeting.

1. The reference is to the address of Mr. Smith.

that that group can be permitted to come together to formulate their law merchant and write their code without, almost from every aspect, directly affecting interstate commerce?

That is the larger view that one must take in considering the question of interstate commerce as it relates to code making. Many of us have had occasion to present cases involving these very anti-trust laws, and many of us have, time and again, contended and sustained our contentions in all of the courts, that even though a section of the group is localized and engaged in intrastate commerce, and another section of the group is localized and contained in intrastate commerce, when you take them together, when you take them as a group and look at their business as a group, you can't resist the conclusion that they are either engaged in or directly affecting interstate commerce.

I don't mean by that that where you are dealing with a purely service organization that is highly localized, that is within the borders of a given state, and that has no effect upon the rest of the country in the conduct of its business, it must necessarily come within the purview of federal regulation.

The act contemplates, and all those who had anything to do with it contemplated, that there would be supplementary legislation of the various states; and within the very state in which we are now in session, there has been enacted a counterpart of the National Recovery Act, to cover a localized, situation. That doesn't mean that you have to nullify the entire Act, and it doesn't mean that you have to declare the whole Act unconstitutional, because perhaps in certain instances the court may have to say that it has no applicability.

Now, that much for the interstate commerce feature of the legislation. I will take only five minutes more, Mr. Butler, if I may (I hope I haven't taken too long), to discuss what seems to me to have been the inspiring purpose of the legislation, its relevancy to the existing emergency, its utter necessity in the conditions that confronted us a year ago, its efficacy in eradicating certain difficulties that we had encountered. It is rather a big contract to undertake to cover these matters in five minutes, but I think I might summarize the situation in just this way:

There has been a lot of talk lately about the danger of our so-called Brain Trust breaking loose. I have never felt and do not feel now that that is any source of danger to anybody. We have all felt, and I think we have all found, that a year ago the grave danger and the real source of danger to our national economy lay in the fact that our legitimate labor organizations were being by degrees demoralized and that Communistic groups and Red agitators and Left Wingers were eating into the very heart of these organizations, that the ranks of these extremists were being recruited and supplemented by the greatest evil that has hit this country in this entire disastrous period, the evil of unemployment.

Something was necessary, first, to strike at the major disease that afflicted this country, this business of having millions of people unemployed, and the only way that that could be effectively worked out—and I wish my good friend, James Emery, with whom I have had many an evening on this subject in those moments when this bill was being framed, could begin to realize that that was the fundamental purpose of that labor section and have the group that he leads help along in the effort, because we are not yet out of the woods—the only way that we could devise and the only way that could be devised, was to revitalize the legitimate labor organization to give it power, to give it life, to give it strength. It was dying and in its place was coming a Red Menace.

Those who studied the situation a year ago knew that the ranks of the legitimate labor organizations were being depleted; that Red agitators were all over the country organizing Communistic Wings and Communistic branches; the relief needs had eaten out the treasuries of these legitimate labor organizations. And so there was this one labor policy incorporated in the Act; to wit, the American idea of collective bargaining through freely chosen representatives, of a legitimate labor organization

What has happened? Has it accomplished its purpose? All you need to do is ask what was the membership of the American Federation of Labor a year ago and what is it today. Ask yourselves whether or not it is true that perhaps three, perhaps less, perhaps more, millions of people have been reemployed through this very effort.

When you fortify a conservative, responsible labor organization, you thereby deal a blow to the illegitimate, irresponsible kind.

And what else has happened under this Act? Something that has never been known before. For the first time in the history of our land we see a labor organization of large magnitude and an employers' group of substantial proportions coming together to mediate their differences before some governmental agency in Washington.

There have been strikes. I say to you that history proves that strikes are inevitable in the process of recovery. You will always find them where you are recovering. But what has happened? You see a strike and sometimes almost overnight, through the mediation of this National Labor Board, the strike is settled. Those are accomplishments. They are not just products of imagination; they are accomplishments by virtue of this instrument known as the Recovery Act.

Now, no court on earth can study the constitutionality and do justice to the question of constitutionality involved, without considering it in the light of the background, in the light of the conditions in the light of the aims, the objects, the purposes, the prevailing strife and struggle of a three-year period of depression. The ultimate test, as I had occasion to say before, might well be: is it really working well? Is it really accomplishing its purpose? And, mark you, if you want to bring that argument into bold relief, just say to yourself, supposing this instrument that we have here does operate to reemploy millions of men, supposing this instrument that we have here does facilitate the settlement of labor disputes, supposing it has had some very definite, benign, wholesome effects in this present situation that we are all familiar with. Suppose it meets the demands of the national emergency. Are we to wipe it from the books because in some instances it may hamper the minority in a group. Rather find a way of protecting the minority judicially or administratively. That may well be accomplished by judicial review of the provi-

sions of each code. I say to you that at the very least you cannot ignore these vital considerations in any discussion of the constitutionality of this legislation. (Applause.)

CHAIRMAN BUTLER: "Does anybody wish to ask Mr. Podell any questions?"

PROFESSOR BUSCHEK, Howard University, Washington, D. C.: "As I understand you, Mr. Podell, you practically admit that the Act as drawn covers certain occupations which are not interstate commerce. Why was the Act thus drawn? Why was it not so drawn as to exclude those activities. That is Question No. 1. Question No. 2: Was that intentional?"

MR. PODELL: "Everybody who had anything to do with the framing of the Act realized that the question was inherent in the document. You couldn't frame any act that would deal with the national situation as it was presented without involving it in that question of Interstate Commerce and constitutionality. Time does not permit a more elaborate answer except that I might add in answer to your first question that there isn't a thing on earth that will prevent the Supreme Court of the United States or any other court, for that matter, from saying: This particular group cannot be brought within the provisions of the Recovery Act; because under well established principle it is neither commerce nor is it interstate commerce. No court is prohibited from saying that and from adhering to established law if it so chooses.

"There is only one other aspect of this matter that needs consideration. We all realize that when a group comes together—and assume now that whole group is engaged in interstate commerce, that is, the group as a whole—looking at them as a group and studying them as a group, you say they are engaged in interstate commerce; that if they adopt any regulation which is to become the law merchant for that industry, unless you make it general in its application, its efficacy is very much lost. I am referring to what is commonly known as the recalcitrant minority. The question then arises whether it lies within the power of government to say that whatever the majority in an industry desires, after it is approved by the government, should be binding upon the minority.

"That again turns upon a multitude of considerations. How is that determined—what are the guides? The Code must not be monopolistic in character. It must not be otherwise illegal. It must be a genuine agreement that really is desirable in the best interests of the industry as a whole. Under those circumstances, if that cannot be made applicable to a minority under the power of a federal law, it may well be that the state law, supplementary to the federal legislation, will reach that minority. If the attempt were to impose upon the minority something which is either illegal or barred by law, or oppressive to the small merchant, or of the character of a monopolistic practice, it wouldn't be permitted under the very standards of the Act. The thing that is attempted to be imposed on the minority is just as much of a burden on them as was the burden before the Recovery Act, that was imposed upon a group of individuals to whom the government said: you are not permitted to come together into a trade group and do thus and so."

MR. NORMAN: "I don't know that I should prolong the questions, and the hour is getting late, and we do want to hear from Mr. Montague, but on the question of the power under the interstate commerce clause, that power extends not only to interstate commerce but also to the control of that which unduly burdens interstate commerce; that as to whether it does burden interstate commerce is really a fact. What do you say about the weight that the court must give to the declaration of that fact by the legislative power?"

MR. PODELL: "Well, let's take a concrete case; let's say that in the textile industry there is a rule that the minimum wage in a given area should be $12 per week. A group of operators in a certain section of the state say: We are not engaged in interstate commerce. We are part of this organization that came together to try to formulate a code, yes, but we are not affecting interstate commerce, and we ought not to be subject to this regulation. I think that probably concretely states your question. Am I right on that?"

MR. NORMAN: "Assuming that the state said that the failure to maintain the minimum wage would be a burden, what weight should the court give to the legislative declaration?"

MR. PODELL: "I think it can give the same weight to it that it normally has given to any similar legislative declaration. The courts have said that the legislative pronouncement of the existence of an emergency is prima facie proof of its actual existence. That does not bar the court from making inquiry into the question as to whether or not the refusal of a minority to go along with the majority under the code is justified on the ground that the minority's failure to comply will not be an undue burden on the rest of the group.

"The question of whether they are a burden to interstate commerce, I think is always open to the court. My own views are (I haven't any authority for the proposition, because the situation is novel) that with respect to these codes our courts should be free to apply constitutional principles, equitable principles, legal principles in modifying, or eliminating provisions of codes that inveigh, that transgress on established law just as freely as they might do in writing any decree. I see no reason at all why if an administrator permits the incorporation of a provision in a code which clearly violates somebody's constitutional rights, the court cannot say so in any given case or as to any given code. That is our safeguard, because just as the Supreme Court of the United States used to take each of the anti-trust cases and pass upon each fully, so I think it can, reserving all its powers, study each code and its various provisions—in the light of the constitutional guarantees—also apply if it chooses, equitable principles to any and every provision of any and every code."

SOME CONSTITUTIONAL ASPECTS OF THE NATIONAL RECOVERY PROGRAM

On Its Face the National Industrial Recovery Act Is within the Commerce Clause, but There Is Much Doubt as to the Extent to Which Code Provisions Are Enforceable Thereunder—President's Power to License under This Act and Agricultural Adjustment Sections of Farm Mortgage Act—Constitutional Questions in Connection With Banking Legislation—Criticism of Securities Act—If These Measures and Their Implications Are Sustained, It Means Complete Change in Our Theory of Government[1]

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WITH the exception of those calling for the use of public funds, the principal recovery measures so far enacted are the monetary legislation, the agricultural adjustment sections of the Emergency Farm Mortgage Act, the Industrial Recovery Act, the new Banking Act, and the Securities Act.

1. The Monetary Legislation—Public Resolution No. 10 of the Seventy-third Congress.

Public Resolution No. 10 of the Seventy-third Congress provides that all bonds or other obligations containing a gold clause shall be discharged, dollar for dollar, in any money which is legal tender at the time of payment. The validity of this resolution has been questioned in Law Review articles and challenged in a number of cases now pending.

The power of Congress to establish a national currency, to declare of what it shall consist, and to make the same lawful money and legal tender for the payment of all debts, public and private, whether previously existing or subsequently incurred, is firmly established by judicial authority.[2] The Constitution confers upon Congress the power "to coin money and to regulate the value thereof." Money as such has value only to the extent that its acceptance may be required in the discharge of obligations, whether for the payment of debts, the performance of services, the purchase of goods, etc. The power to regulate the value of money, therefore, consists chiefly, if not wholly, in the power to make it legal tender for the payment of all such obligations. In the *Legal Tender Cases* the Court held that the use of the word "coin" in the Constitution did not limit Congress to the prescription of metallic money, only, as legal tender, but that Congress was empowered to give to treasury notes "the character and qualities of money . . . having a legal defined value" by requiring their acceptance in the discharge of all obligations, public and private. In so deciding, the Court held that there was "no well founded distinction to be made between the constitutionality" of the legal tender acts as applied to preexisting as well as to subsequently incurred debts.

The preexisting obligations involved in those cases were payable in money but not in any particular kind of money. The precise question presented by the Resolution was not, therefore, before the Court in those cases. But in sustaining the constitutionality of the Legal Tender Acts as applied to preexisting debts, the Court held that, as so applied, they were not repugnant to the Fifth Amendment. In those cases is to be found perhaps the first elaborate discussion of the doctrine that all contracts, whenever made, and whatever their terms, the subject matter of which is within the field of Congressional power, must yield to any Act of Congress, whether enacted previously or subsequently to such contract. It is not without significance that the *Legal Tender Cases* are among the cases principally relied on by the Court in *Louisville & Nashville R. R. v. Mottley*,[3] in support of this doctrine as applied to contracts, good when made, but within subsequently enacted prohibitions of the Interstate Commerce Act. The doctrine announced in the *Legal Tender Cases* is now firmly imbedded in our jurisprudence.[4]

As said by the present Chief Justice in *Philadelphia, Baltimore & Washington R. R. v. Shubert*:[5]

". . . To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. . ." (pp. 613-614)

Creditors holding obligations containing a gold clause have "by prophetic discernment" attempted to withdraw from Congress a portion of the field declared to be its in the *Legal Tender Cases*. It is a matter of common knowledge that many billions of dollars of such obligations were outstanding at the time of the adoption of this Resolution.

The preamble of the Resolution declares that such clauses

"obstruct the power of the Congress to regulate the value of money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

While the question is by no means free from doubt, it is believed that the validity of this Resolution will

1. Address delivered before the Commerce Committee of the American Bar Association, at New York, April 11, 1934.
2. *Veazie v. Fenno*, 8 Wall. 533; *Legal Tender Cases*, 12 Wall. 457, 110 U. S. 421.
3. 219 U. S. 467.
4. *Louisville & Nashville R. R. v. Mottley, supra; Philadelphia, Baltimore & Washington R. R. v. Shubert*, 224 U. S. 603; *Calhoun v. Massie*, 253 U. S. 170; *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182; *Union Bridge Co. v. United States*, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; *Louisville Bridge Co. v. United States*, 242 U. S. 409.
5. 224 U. S. 60.

be sustained both on the authority of the *Legal Tender Cases* and on principle.

2. Industrial Recovery Act and the Agricultural Adjustment Sections of the Emergency Farm Mortgage Act

By the agricultural adjustment sections of the Emergency Farm Mortgage Act and executive action taken thereunder, the Federal Government has undertaken to control the production and distribution of certain basic agricultural products.

By the Industrial Recovery Act and executive action taken thereunder, the Federal Government has undertaken to control substantially every other branch of industry in respects familiar to the public at large. On its face, the Act is confined to interstate and foreign commerce or to transactions "affecting" the same. On its face, it is thus within the commerce clause. In its administration codes have been adopted relating not only to the production of articles subsequently moving in interstate commerce and to practices (including in some instances price fixing or regulation) governing the distribution of articles so produced when moving in interstate commerce, but to the purely intrastate operations of companies engaged in both interstate and intrastate business. Under the authority of this Act, codes have also been adopted applying to persons or corporations engaged solely in intrastate commerce and in activities affecting interstate commerce only remotely or indirectly, if at all. Under such codes, there have been drawn within the administration of the Act the regulation of retail stores doing business wholly in a single state and generally in a single community, local public utilities operating in a single state and generally in a single community and persons performing personal services within a single state and usually within a single community, such as cleaners, dyers, laundries, clothes pressers and professional or quasi-professional men of various descriptions.

By their terms and in their administration, both the agricultural adjustment sections of the Emergency Farm Mortgage Act and the Industrial Recovery Act rely largely upon the voluntary cooperative action of the persons engaged in the particular industry or pursuit affected. Persons signing the President's Reemployment Agreement have been held to have undertaken contractual obligations thereunder enforcible at the instance of employees for whose benefit such agreement is said to have been made.[6] The extent to which persons voluntarily subscribing to such agreement, to codes or to any system of regulation adopted under either of these Acts may be deemed to have entered into contracts enforcible against them either by private parties or by the Government presents interesting questions of law but not questions going, primarily, either to the constitutional power of Congress or of administrative officers of the Government.

Both Acts contemplate the exercise of compulsion, if necessary, upon the part of the Government.

Laying aside the controversial questions involved in the labor provisions of the Industrial Recovery Act, that Act undertakes to enforce obedience to its purposes (1) by enforcement of Code provisions under the Federal Trade Commission Act and (2) by the exercise of a power to license persons engaged in interstate commerce.

The Act makes the provisions of any code adopted thereunder the standard of fair competition for the trade or industry affected and declares any departure therefrom an unfair method of competition within the meaning of the Federal Trade Commission Act. I shall not discuss the question as to whether these provisions are void as a delegation of legislative authority. Such questions affecting this and other parts of the Recovery program are questions going to the machinery of administration rather than to the existence of Federal power. Laying this question aside, there would seem to be little doubt as to the validity of this provision of the Act itself. On the other hand, there would appear to be much doubt as to the extent to which the Code provisions are enforcible thereunder. Insofar as such provisions relate to trade practices directly affecting the distribution of goods in interstate commerce, they would appear to be clearly enforcible under the clause in question. Insofar as they seek to establish wages, hours of labor, working conditions, or otherwise to govern the production of goods, they would appear to be unenforcible unless and until the *Child Labor Case*[7] (decided by a divided court) shall be overruled, distinguished or qualified. Insofar as such provisions deal with distribution, as contrasted with production, in state as well as interstate commerce, they would appear to be enforcible, or not, according to their actual, as compared with a fictional, or theoretical, relation to interstate commerce, and, perhaps, in some degree to the extent of obstruction and interference therewith, unless extended to state as well as to interstate transactions.[8]

The agricultural adjustment sections of the Emergency Farm Mortgage Act as well as the Industrial Recovery Act confer upon the President authority to license all persons engaged in interstate commerce in the particular fields of activity embraced by the Acts and prohibit engagement in interstate commerce by any persons not so licensed in the event the President exercises the power conferred. The lower Federal Courts have sustained the constitutionality of this provision of the Agricultural Adjustment Act.[9] Again laying the question of delegation of legislative authority aside, it would seem that the licensing provisions of both acts are on their face within the commerce clause and that the only questions which may arise in connection therewith are those arising from the nature and the extent of the regulations sought to be enforced thereunder. In view of the decision in the *Child Labor Case*, it would seem to be obvious that, if the granting of a license were made dependent upon the observance of conditions relating solely to the production of goods thereafter to be shipped in interstate commerce, such attempted regulation under the licensing power would

6. *Beaton v. Avondale* (D. C. 2nd Judicial Dist. of Colorado, October 28, 1933) and reported in C. C. H. *Federal Trade Regulation Service*, Vol. II, par. 7082; *Freyn v. Fair Lawn Fur Dressing Co.* (N. J. Ch. Nov. 15, 1933); 114 N. J. Eq. 462; *Sherman v. Abeles* (Sup. Ct. N. Y. Co., Jan. 2, 1934) 91 N. Y. L. J. No. 2; *Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Co.* (C. C. Milwaukee Co., Wis., Oct. 13, 1933) No. 131, 900, and reported in C. C. H. *Federal Trade Regulation Service*, Vol. II, par. 7067.

7. *Hammer v. Dagenhart*, 247 U. S. 251.

8. Cf. *Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, and *State of Florida v. United States* (2nd Florida Log Case), No. 342, decided April 2, 1934; with *American Express Co. v. Caldwell*, 244 U. S. 617; *Wisconsin Railroad Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563; *State of Florida v. United States* (First Florida Log Case), 282 U. S. 194

9. *United States v. Calistan Packers, Inc.*, 4 Fed. Supp. 660 (D. C. N. D. Cal. Oct. 2, 1933); *Economy Dairy Co. Inc. v. Wallace*, decided by Supreme Court, District of Columbia, August 29, 1933, and reported in 61 Wash. Law Rep. 633; *Beck v. Wallace* decided by Supreme Court, District of Columbia, August 29, 1933, and reported in 61 Wash. Law Rep. 633; *Capital City Milk Producers Ass'n, Inc. v. Wallace*, decided by Supreme Court, District of Columbia, January 15, 1933, and reported in C. C. H. *Federal Trade Regulation Service*, Vol. II, par. 7078; *contra Hillsborough Packing Co. v. Wallace*, District Court, S. D. Fla., February 1, 1934, and reported in C. C. H. *Federal Trade Regulation Service*, Vol. II, par. 7103, ordered stayed, *Yarnell v. Hillsborough Packing Co.*, decided by C. C. A. 5th, February 9, 1934, and reported in C. C. H. *Federal Trade Regulation Service*, Vol. II, par. 7102A.

be void. If, on the other hand, the conditions of license fairly relate to movements in interstate commerce and do not, under the guise of such regulation, impinge upon the exercise of state authority or upon rights of individuals capable of exercise until and unless restricted by state as contrasted with Federal authority, then the enforcement of the purposes and of the objects of these acts by the exercise of a power to license would appear to be within the commerce clause.

The Agricultural Adjustment Act also rests in part upon the taxing power through the levy of processing taxes. Congress may not, under guise of a tax, enact laws, the real purpose of which is to extend its authority over matters not within its delegated powers. On the other hand, the fact that the effect of the tax imposed is to restrict the production of articles of commerce or restrain the exercise of powers conferred by State authority, does not render a tax law invalid if sustainable, in itself, as such.[10] On which side of the line these provisions of the Agricultural Adjustment Sections of the Emergency Farm Mortgage Act fall would involve an analysis of its provisions and purposes and of the conditions under which it is designed to operate, which the writer, with the limited knowledge in his possession, would not feel competent to discuss, and which, if discussed, would extend this paper beyond reasonable limits.

3. The Banking Act.

With the exception of Sec. 21, the Banking Act of 1933 deals wholly with the Federal Reserve System and its member banks. Sec. 21 (1) makes it unlawful, after the expiration of one year from the date of the Act, for any person engaged in the business of dealing in securities to receive deposits subject to check. Sec. 21 (2) forbids any person or corporation, after said date, other than "a financial institution or private banker subject to examination and regulation under State or Federal law" to receive deposits, subject to check, unless such person shall submit to periodic examination by the Comptroller of the Currency, or by the Federal Reserve Bank, and otherwise comply with the provisions of the Act.

The effect of this section is (1) to prohibit State banks, not members of the Federal Reserve System, from dealing in securities, and (2) to prohibit private bankers from accepting deposits unless they give up their security business, and also subject their banking operations to the same regulation imposed upon commercial banks.

Seemingly, this section of the Banking Act is not within the powers of Congress unless it is within the power of Congress to prohibit any bank, public or private, within any State, to receive deposits unless a member of the Federal Reserve System, or except under such conditions as may be prescribed by Congress.

The power of Congress to regulate all banking activities to the exclusion of the States is sought to be rested upon the power (1) to establish national banks and a national banking system, (2) to establish a national currency, and (3) to regulate interstate and foreign commerce.[11]

The power of Congress to establish a national banking system is beyond dispute.[12] The States are without authority, except as permitted by Congress, to tax national banks or exercise any visitorial powers thereover or to interfere with the operations thereof.[13] On the other hand, State banks, which have become a part of the Federal Reserve System, and their officers are subject to Federal statutes enacted for the regulation and protection of the Federal Reserve System.[14] The Federal government, in order to permit national banks effectively to compete with State banks, may also confer upon the former powers not directly connected with banking, such as power to act as executor, trustee, etc.[15]

But it has never been held that Congress may regulate or control the activities of State banks, not members of the Federal Reserve System, prohibit their acceptance of deposits, preclude the States from providing for their incorporation and regulation, or destroy them altogether. The power to establish national banks or a national banking system is not a power expressly conferred upon the Federal government. It is an implied power growing out of a combination of powers requiring the exercise by the Government of fiscal operations.[16] The establishment of the Bank of United States was sustained upon the theory that it was "an instrument which is 'necessary and proper' for carrying on the fiscal operations of the Government."[17] The State governments, as well as the Federal government, carry on fiscal operations for which they have the power to establish and choose their own instruments. Just as the State governments may not tax or interfere with instrumentalities of the Federal government, neither may the latter tax or interfere with the instrumentalities of the former.[18] Moreover, it is difficult to perceive how the acceptance of the deposits of private individuals by a State bank can constitute any interference with the fiscal operations of the Federal government through the use of national banks as instrumentalities for their conduct, or indeed, with the operation of such instrumentalities themselves.

In the exercise of its power over the currency, Congress may without doubt define the conditions upon which any bank, State or Federal, may exercise the powers, directly or indirectly, of a bank of issue, or become a member of the Federal Reserve System. The relation between the exercise of this power and the power to regulate all banks of deposit, as well as all banks of issue, or to prohibit the acceptance of deposits by banks, except under terms imposed by Congress, would appear to be somewhat remote. It is said that "checks . . . have to a very large extent taken the place of currency as a medium of payment."[19] But checks are not currency and have none of the characteristics thereof, as defined in the Legal Tender Cases, or under any rational definition of the term. The extent to which discountable paper may be available as the basis for the issuance of Federal Reserve Bank notes may be governed, in part, in the last analysis, by the aggregate deposits of the member banks. Even

10. Cf. *Child Labor Tax Case*, 259 U. S. 220, and *Hill v. Wallace*, 259 U. S. 44, with *McCray v. United States*, 195 U. S. 27 and *Veazie Bank v. Fenno*, 8 Wall. 533.

11. See Opinion of General Counsel of the Federal Reserve Board upon the Constitutionality of Legislation Providing a Unified Commercial Banking System for the United States, December 6, 1932, reported in C. C. H. Federal Reserve Bank and Law Service, p. 7851; Constitutionality of Exclusive Federal Control Over Commercial Banking, 43 Yale Law Journal, January, 1934, 454.

12. *McCulloch v. Maryland*, 4 Wheat. 316, *Osborn v. Bank of U. S.*, 9 Wheat. 738, *Farmers & Mechanics Nat'l Bank v. Dearing*, 91 U. S. 29.

13. *McCulloch v. Maryland*, *supra*, *Osborn v. Bank of U. S.*, *supra*, *Farmers & Mechanics Nat'l Bank v. Dearing*, *supra*, *Davis v. Elmira Savings Bank*, 161 U. S. 275, *Easton v. Iowa*, 188 U. S. 220.

14. *Westfall v. U. S.*, 274 U. S. 256.

15. *First Nat'l Bank v. Union Trust Company*, 244 U. S. 416, *Burnes Nat'l Bank v. Duncan*, 265 U. S. 17.

16. *McCulloch v. Maryland*, *supra*, *Osborn v. Bank of U. S.*, *supra*.

17. *Osborn v. Bank of U. S.*, *supra*, at p. 860.

18. *The Collector v. Day*, 11 Wall. 113.

19. Opinion of General Counsel of Federal Reserve Board, *supra*, p. 5549.

so, it is difficult to perceive upon what theory the power of Congress to establish a national currency, to determine of what it shall consist and by whom it may be issued, includes the power to prohibit a State bank, which is neither directly nor indirectly a bank of issue or seeks to become such, from accepting a deposit from a private individual willing and desirous of depositing his money with such bank, or to compel such a bank to discount paper within the Federal Reserve System.

The attempt to support the exercise of this power under the commerce clause is not based upon the theory that the banking business is itself commerce, but upon the assumption that banks are instrumentalities in interstate commerce. This would appear to be stretching the commerce clause beyond all rational limits.[20]

In its last analysis, the argument proceeds upon the assumption that in the present state of our national economy and life, there is room for but a single banking system, and that such a system can be provided only by the Federal government. The same argument might be made for the necessity of a uniform bankruptcy law. Yet, except for the express provision of the Constitution, it would scarcely be contended that Congress had power to provide a national bankruptcy law, to the exclusion of State authority, because of the desirability or necessity of uniformity. It is not without interest in this connection that at the time of the establishment of the Bank of United States grave doubts were expressed as to the power of the Federal government to establish such a bank, even as an instrument for the conduct of its own fiscal operations, regulation of banking being a matter primarily of local concern. It is now suggested that the interest of the nation as a whole in the establishment and regulation of a banking system is such that States may be precluded from the exercise of any powers thereover, although there is no provision of the Constitution expressly conferring upon Congress power to establish a banking system. Considered separately, it may well be doubted that any of the powers relied on is sufficient. It is also doubtful whether the combination of powers relied on is sufficient to support the power asserted over the making and receipt of deposits. In any event, in order to sustain it, the courts will have to go considerably farther than they have gone in the past in the cases defining the powers of the Federal government over either the banking system, the currency, or the regulation of commerce.

4. The Securities Act

By the Securities Act, the Federal Government has undertaken to control the issuance, distribution and sale of securities (except in the case of certain securities and transactions expressly exempted) within any part of the United States, whenever such sale is to be effected by public offering (or without public offering, if an underwriter is involved), and to fix the civil rights and liabilities of the persons affected thereby, whether such securities are sold in intrastate or interstate commerce. These purposes are sought to be accomplished (1) by prohibiting the use of the instrumentalities of interstate commerce, or of the mails, for the shipment of any security (except as expressly exempted) by the issuing corporation, or by an underwriter, as defined in the Act, or (within one year after issue) by any dealer in securities, unless such security is registered with the Federal Trade Commission and a registration statement in the extensive detail required by the Act filed with the Commission; (2) by preventing the use of the mails, or of any instrumentality of interstate commerce in the sale of any security by an issuer, underwriter or dealer unless so registered, (3) and by prohibiting offers to sell or purchase such securities by use of the mails, or by any instrumentality of interstate commerce, unless the securities are registered and a detailed prospectus containing the statements and information required by the Act to be contained therein is sent to the prospective purchaser.

Only in the event that the entire issue is sold within a single state by an issuing corporation, incorporated within that state, to persons all of whom are residents of that state, are the provisions of the Act concerning the use of the mails inapplicable. Even in that event the instrumentalities of interstate commerce may not be used. Moreover, if the security is registered under the Act, the liability provisions of the Act apply, irrespective of the use of the mails or of the instrumentalities of interstate commerce, or of reliance on the registration statement by the purchaser. As a practical matter, it would be virtually impossible to distribute securities (except those expressly exempted) without registration.

It may be doubted whether stocks and bonds are articles of interstate commerce within the meaning of the commerce clause. It has been repeatedly held that contracts of insurance are not such articles of interstate commerce.[21] At an early date, it was held, in *Nathan v. Louisiana*,[22] that a dealer in bills of exchange was not engaged in interstate commerce. On the other hand, in the *Lottery Case*,[23] it was held that lottery tickets were articles of interstate commerce and that it was competent for Congress to prohibit their transportation therein. Subsequently, in *Hemphill v. Orloff*,[24] the Court held that a dealer in negotiable notes was not engaged in interstate commerce, citing in support, among others, its previous decision in *Nathan v. Louisiana*. Bills of exchange and negotiable notes, as well as lottery tickets, are property and evidence of the right, under the conditions specified, to the payment of money. The cases are seemingly in conflict and can be reconciled only by the Supreme Court itself.

Assuming, however, that stocks and bonds are articles of interstate commerce, it does not necessarily follow that the Securities Act may be sustained under the commerce clause. Congress, under the guise of the exercise of an express power, may not exercise powers reserved to the States or exercise control over matters not within the sphere delegated to it by Article I, Sec. 8 of the Constitution.[25] There is a plain distinction between the power of Congress to regulate the instrumentalities of interstate commerce and those engaged in their operation, and its power to regulate or control the articles which may be transported thereby.[26]

The most extreme extensions of the commerce clause, sanctioned by the Supreme Court, are those found in the Stock Yards and Grain Exchange cases.[27]

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20. See discussion of the extent of and limitations upon the powers exercisable under the commerce clause in the next succeeding section dealing with the Securities Act.

21. *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110; *Hooper v. California*, 155 U. S. 648; *Noble v. Mitchell*, 164 U. S. 367; *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389; *Nutting v. Massachusetts*, 183 U. S. 553; *N. Y. Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495.

22. 8 How. 73.

23. 188 U. S. 321.

24. 277 U. S. 537.

25. *Hammer v. Dagenhart, supra; Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44.

26. Cf. the cases regulating corporations operating railroads and the *Child Labor* case, *supra*;

27. *Stafford v. Wallace*, 258 U. S. 495, *Chicago Board of Trade v. Olsen*, 262 U. S. 1.

The proponents of this Act and of the Stock Exchange Securities Bill, now before Congress, rely strongly upon these cases. In neither did the Act sustained purport directly to regulate the movement of interstate commerce. Instead, it undertook directly to regulate the business of persons engaged, through the medium of livestock and grain exchanges, in the purchase and sale, as commission men or brokers, of livestock in one case and of grain in the other. Neither of these occupations, as such, is one carried on in interstate commerce. The justification for the regulation, as pressed upon and sustained by the Court, was that the transactions in which these persons engaged were such as directly to affect, impede or obstruct the free flow of interstate commerce in livestock and grain. It was further said that the State and interstate transactions of such persons were so commingled that the freedom of interstate commerce in livestock and grain could not be effectively protected without the extension of the Act to *all* transactions in connection with the purchase and sale of such articles, in which the persons to which the acts respectively applied were engaged.

The extreme limits to which the court went in these cases affords a powerful argument in support of any act sought to be sustained under the commerce clause. On the other hand, the very extremity of those cases suggests limitations. If, upon their authority, all persons engaged in any occupation affecting in any degree the movement of any article in interstate commerce, may be subjected to Federal regulation, then there is no occupation which involves the purchase and sale of personal property which is free therefrom.

The articles of commerce involved in those cases constitute the principal sources of world subsistence. It is a matter of common knowledge that their predominant movement is in interstate commerce. Movements within the borders of a single State are either incidental or preliminary to movement in interstate or foreign commerce, or if in themselves complete, represent but a small part of the commerce affected. In each case, as stated by the Court, the articles in question were not only articles moving in interstate commerce, but there was a constant flow of such articles into and out of the points at which such livestock and grain markets existed. Sale thereof on the exchanges was only an incident to such movement.

It is not enough that the Act in form is one prohibiting or regulating the transportation of articles moved in interstate commerce. The Act condemned in the *Child Labor* case was of this description. It was condemned because, while in form a regulation of the movement of articles in interstate commerce, it was in purpose and effect a regulation of production. So it may be fairly argued that the Securities Act, in form a regulation of the movement of stocks and bonds as articles of interstate commerce, if they be such, is in effect a regulation of the conditions under which securities may be issued and offered for sale, matters hitherto supposed to rest wholly within the powers of the state of incorporation of the issuer, or of the State in which the contract for sale was proposed to be made.

That the purpose of the Act is not to exclude from interstate commerce the movement therein of undesirable and objectionable articles, but to regulate the conditions under which securities may be issued and offered for sale, the business of dealing in securities, and the civil rights and liabilities of persons engaged in the issuance, underwriting, sale and purchase of such securities is evidenced by the provisions of the Act itself.

First: Unless a security is to be publicly offered, or is issued through an underwriter, it may be freely shipped in interstate commerce or through the mails, and either may be used as a channel of communication in solicitation of orders for the purchase of such security, without registration, and hence without public disclosure of the information required by the Act to be contained in the registration statement and in the prospectus which must accompany solicitations to purchase.

Second: Prohibition of transmission in interstate commerce or through the mails of unregistered securities is limited to such transportation by an issuer, underwriter or dealer. The purchaser of such a security (if not an underwriter or dealer) is not prohibited from thereafter transmitting such security to himself, to his agent, or to any purchaser from him, either in interstate commerce or through the mails. Yet the security so transported is precisely the same security as that covered by the prohibition. Similarly, while no registered security may be transported in interstate commerce by an issuer, underwriter or dealer, unless accompanied by a prospectus containing all the disclosures required by the Act, the purchaser (unless a dealer) may thereafter ship the same security in interstate commerce to a subsequent purchaser or to any other person without the accompanying prospectus.

Under the Act the Federal Trade Commission is empowered, after distribution has begun, by stop order to prevent further distribution of securities by an issuer, underwriter or dealer, in the event that the registration statement is found to be incomplete or inaccurate in any material respect. If the purpose of the Act is to regulate the business of dealing in securities this is an appropriate and necessary provision. If, on the other hand, the purpose of the Act is to exclude from the mails or interstate commerce objectionable articles, it is obvious that the securities to which the registration statement relates are equally objectionable if in the hands of a person other than an issuer, underwriter or dealer, but the stop order extends only to the latter.

The prohibitions against the use of either interstate commerce or of the mails for the transportation of securities are not, therefore, directed against the shipment of the security itself, but against its shipment by certain classes of persons.

Third: As already pointed out, the purchaser at the point of issue is not prohibited from transporting through the mails or in interstate commerce the security purchased. Since it would be a simple matter to provide in every case for delivery by the original issuer or underwriter at the point of issue, it is obvious that insofar as the Act seeks to regulate the issuance and distribution of securities and the liabilities arising therefrom, prohibitions against shipment in interstate commerce, alone, are wholly insufficient for the accomplishment of this end. Consequently, the Act prohibits the use of the mails or of the instruments of transportation or communication in interstate commerce in any manner whatsoever in connection with the making of offers either to sell or buy securities publicly offered, unless registered, and then only when made in the manner prescribed. These prohibitions apply whether the sale is one involving interstate transportation of the security itself or not. It may be doubted whether these prohibitions in respect of communications in connection with the proposed purchase or sale of securities are not

in conflict with *Blumenstock v. Curtis Publishing Company*,[28] and *United States Fidelity & Guaranty Co. v. Kentucky*.[29] In the former case, the Court, reaffirming the doctrine of the latter, said:

"In the recent case of *United States Fidelity & Guaranty Co. v. Kentucky*, 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the State, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the State. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate commerce, or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business."

Fourth: The statutory causes of action, rights and liabilities created apply in connection with the sale of any registered security irrespective of the use of the mails or of the instrumentalities of interstate commerce in connection with the sale by which the purchasing plaintiff acquires the securities. The liability sections of the Act also make the original issuer, underwriter and certain other persons liable to any subsequent purchaser without regard to privity, to the use of the mails or of the instrumentalities of interstate commerce in connection with such subsequent purchase, and irrespective of reliance, or causation of damage. These provisions make it plain that the object and purpose of the Act is to regulate the civil liabilities of persons engaged in the issuance, underwriting and distribution of securities and not to regulate the movement of such securities in interstate commerce.

In so doing Congress has modified the common law rules of liability and has created liabilities and causes of action unknown to the common law. Such modification and changes in common law liabilities growing out of purchase and sale of personal property are primarily for the States and not for the Federal government.

In Hooper v. California,[30] the court said:

"It (the contention that corporations engaged in the writing of marine insurance were not engaged in interstate commerce) ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature."

The validity of the Securities Act is also sought to be supported upon the power of Congress to regulate the use of the mails. The power of Congress to prevent the use of the mails for fraudulent purposes as well as to exclude dangerous or objectionable articles therefrom is beyond dispute. It is a power, however, whose exercise is subject to the limitations of the Fifth and Tenth Amendments.[31] Even in so far as the Act is limited to the exclusion of unregistered stocks and bonds themselves from the mails, it is difficult to sustain it under the power to exclude dangerous or objectionable articles, particularly since, as pointed out above, such exclusion only applies when the transmission by mails is in connection with a transaction between certain classes of purchasers and sellers. In prohibiting the use of the mails for the purpose of disseminating information concerning securities, and for the solicitation of the purchase or sale thereof, except when registered and offered in accordance with the provisions of the Act, the Act itself goes far beyond measures necessary for the prevention of fraud. The liability sections of the Act make that fraud in law which is not fraud in fact or at common law. It is these provisions of the Act which give it teeth and make it effective. If under the guise of a regulation of the mails Congress may prescribe conditions governing the offering of securities for sale and in so doing create civil liability for fraud beyond that imposed by common law, then it may by similar legislation remake, according to its own purposes and desires, the substantive law of fraud and deceit as applied to the sale of any other articles in whose sale the mails are employed.

28. 252 U. S. 436.
29. 231 U. S. 394.
30. 155 U. S. 648.
31. *Burton v. U. S.*, 202 U. S. 344, 371; *Lewis Publishing Co. v Morgan*, 229 U. S. 288, 313, 316.

Conclusion

If all of these acts and the implications of authority contained therein, and in their administration as hitherto conducted, be within the Constitution, then the Federal Government is empowered:

(1) To control the production and distribution of all agricultural products.

(2) To control, in their most important aspects, the production and distribution of substantially all other articles commonly moving in commerce.

(3) To regulate the business of banking to the exclusion of the States.

(4) To regulate and control the issuance, distribution and sale of securities.

(5) To fix the civil rights and liabilities of persons engaged in the sale of articles moving in interstate commerce, or whose sale is solicited by means of interstate communication or through the mails.

This vast array of powers is sought to be sustained chiefly under the commerce clause, although other provisions of the Constitution are relied on. The commerce clause has been a fruitful source of extensions of Federal power into fields theretofore exclusively occupied by the States, and whose extension would probably have been rejected by the judicial thought of the immediately preceding generation. It will no doubt continue to be the source in the future of similar further extensions of Federal authority. As economic and social conditions change in the future, as in the past, it may also be fairly assumed that the restraints of the Fifth and Fourteenth Amendments will be lifted in respect of many matters of legislation to which hitherto regarded as applicable. Federal encroachment upon the theretofore exercised powers of the State and the relaxation of the restrictions of the Fifth and Fourteenth Amendments have hitherto been by gradual process. At a single session of Congress there has been passed a body of laws which, if the extreme application sought to be given to them be valid, would in effect transfer to the Federal Government substantially the entire police power of the States. Moreover, experience teaches that powers so vast can be exercised in practice only through a bureaucratic administration. Courts and judicial process are not adapted to the disposition of administrative problems. Experience also teaches that bureaucratic administra-

(*Continued on page* 318)

AMERICAN BAR ASSOCIATION JOVRNAL

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BOTH SIDES OF THE NATIONAL RECOVERY ACT

The Journal devotes a large part of this issue to four addresses made at the recent meeting of the American Bar Association's Committee on Commerce on the general subject, "Legal Aspects of the Legislation Underlying the National Recovery Program."

The four addresses selected from the genuine wealth of material made available at this meeting were chosen because they presented fairly and ably both sides of the broad constitutional questions involved in the National Recovery Act. Other parts of the recovery program are of course touched on but the main attention is devoted to the piece of legislation which is probably the most important in the list and which present circumstances are bringing increasingly to public attention.

It is to be regretted that lack of space rendered it impossible to print other addresses made at the meeting. Some of these were interesting discussions of various aspects of the National Recovery Act—important in themselves but not going to the root of the fundamental question of Congressional Power. At least one other boldly challenged the constitutionality of the legislation but along lines sufficiently covered by the two selected to represent that side of the debate. Taking the addresses all in all, they represented without exception a real contribution to the study of the great questions which are today occupying the mind of the entire nation.

It was perhaps well that the Commerce Committee's consideration of this legislation was not had at an earlier date. A tremendous amount of spade work has been done since the enactment of the National Recovery Act and other measures, and all this has helped to clarify the constitutional issues involved. We incline to believe that the discussion in the addresses printed in this issue make use of all pertinent material, and that they outline distinctly the main considerations which will impress the courts, in case they are called on to speak the final word on the subject.

If the speakers found themselves unable to agree at vital points, that was hardly to be wondered at, in view of the support for both sides which can be found in the interpretation of the material.

WHAT MAKES A "LEARNED PROFESSION?"

In the Carnegie Foundation's Annual Review of Legal Education Mr. Alfred Z. Reed argues against defining the term "learned profession" too narrowly. "Professional work," he says, "should embrace all those callings—neither more nor less—in which (as originally was true only in the case of theology, law and medicine) a substantial body of higher learning already exists or is in the process of being accumulated."

No member of the traditionally "learned professions" could object to a reasonable extension of the term "profession" or to a public recognition of the propriety of applying the adjective "learned" to it, where in fact real learning is required for its exercise.

As the three traditional learned professions have come down to us, they connote something more than mere learning joined to a special vocation. They have brought with them from the past an aura of devotion to the service of others, a sense of individual responsibility, a consciousness of a public function. These ethical implications of professional learning may have been reinforced by the times when so much of learning was confined to churchmen. At any rate they exist in the case of the theologians, doctors and lawyers, and they thus give to their activities a special significance.

There is no reason why any of the newer learned professions may not acquire this sense of special dedication to service

which distinguishes at least the best members of the old ones. But no matter how many learned professions there may be, we venture the suggestion that for a long time the traditional three will be known and felt as *the* learned professions.

THE UNITED STATES SUPREME COURT ABROAD

The United States Supreme Court, as America's unique contribution to political institutions, continues to receive the study and admiration of many foreign legal scholars. Readers of the Journal will remember the notable address, at Memphis, of Dr. Walter C. Simons, former President of the Supreme Court of the German Republic, in which he told of his unrealized ideal to have the German Supreme Court attain the power and importance of the great American tribunal. His words are still interesting:

"I wanted it to be like the Supreme Court of the United States, a high organ of the Commonwealth, equal in rank to the Cabinet, having immediate intercourse with the President of the Republic; for in my opinion a republican commonwealth will never find a check on the overbearing power of parliamentarism and the secret influence of the ministerial bureaucracy if the Supreme Court is not perfectly independent and on the same footing with both the other powers of the State. Until now, the Reichsgericht has not found a Chief Justice Marshall. I hope with all my heart it will have, some day, his like."

Now from a French source we have another tribute to our Supreme Court. At the opening session of the French Chamber of Deputies every year it is the custom to call the oldest member of that body, in point of years, to the Chair. He thereupon delivers an address. This year the honor fell to M. Groussau and he chose the United States Supreme Court as his subject. After calling attention to certain characteristics of that tribunal, he said:

"These are the basic conditions which should be complied with as far as possible and which should not be lost sight of whenever a Supreme Court shall be created in France.

"The main object of such a Supreme Court would be the protection of the rights of the citizens. It would see to it that all powers, even that of the legislature, should observe the constitutional law and the fundamental rights of the citizens,—inasmuch as all of our 'declarations' are not worth a single judgment of the Supreme Court of the United States, as far as the safeguard of our citizens is concerned."

M. Groussau's brief but interesting "allocution" was published in the April issue of the JOURNAL.

LEGAL PERIODICALS AS AMICI CURIAE

The function of the best legal periodicals of today as unofficial *amici curiae* is well illustrated by the discussion of the National Recovery Program which they have been carrying on almost since the passage of this legislation.

Certainly not since these publications attained a significance and standing which have caused citations of their articles to become familiar in the decisions of various high courts has so important a subject presented itself for their consideration. And they have availed themselves of the opportunity to help in the solution of the important questions involved with zeal and ability.

These articles have covered practically all important phases of the subject and have undoubtedly done much to clear the ground and to aid in the distinct definition of issues which we have today. Nor can it be said that they are merely an academic treatment of matters already in the realm of accomplished facts. The National Industrial Recovery program has proceeded thus far largely on the basis of cooperation and willing agreement to carry out the plans proposed. But should these methods prove inefficient, there are sterner powers held in reserve, and the attempt to exercise them would naturally tend to bring the constitutional questions to the front.

It is safe to say that no important brief dealing with the National Recovery Program will be filed in Court without a careful examination of the body of literature on the subject which has been created by the diligence and ability of the Law Review writers of the country.

SIGNED ARTICLES

The editors of the JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

REVIEW OF RECENT SUPREME COURT DECISIONS

National Banks Held without Power to Pledge Assets to Secure Private Deposits—Such Banks Have Power to Give Only Same Kind of Security for Deposits by State or Political Subdivisions Thereof That State Banking Institutions May Give for Such Purpose —Presumption of Capacity for Child-Bearing Not Conclusive—Contributory Negligence in Railway Crossing Accidents—Contractual Limitation on Liability of Surety, Valid Where Made, Cannot Be Enlarged by Statute in Another State Where Action Is Brought—Washington Excise Tax on Sale of Butter Substitutes Not Violative of Due Process—The Word "Passenger" Not Restricted to Technical Meaning in Suit for Double Indemnity—Iowa Tax on Gasoline As Motor Fuel Valid as Excise and Not Undue Burden on Interstate Commerce, etc.

By Edgar Bronson Tolman*

Banks and Banking—Power of National Banks to Pledge Assets to Secure Private Deposits

National banks are without power to pledge their assets to secure private deposits.

Texas & Pacific Railway Co. v. Pottorff, Adv. Op. 514; Sup. Ct. Rep., Vol. 54, p. 416.

This opinion related to the power of a national bank to pledge a part of its assets to secure a private deposit.

The petitioner had been a depositor in the First National Bank of El Paso since 1922. At that time the Railway was in receivership, and the deposit was made under an order of the court, on condition that the bank should furnish a bond with solvent sureties. This status continued until after the receivership. In 1927, the bank, stating that it desired to be relieved of the burden of paying the bond premiums, requested that the Railway accept a pledge of $50,000 Liberty Bonds as a substitute for the surety bonds. To this the Railway agreed. In 1931 the bank failed, and the Railway, having a balance on deposit of $54,646.94, claimed the bonds pledged to secure its account. The receiver approved the Railway's claim but denied the validity of the pledge. Among other facts appearing it was found that the Railway would not have consented to the substitution without the assurance of the bank and its attorney that it would be as fully protected as it would be by the surety bond. Such assurance was given, and in reliance on it the Railway continued to make deposits.

Suit was then brought by the Railway, in a federal court, praying that the bonds be delivered to it, or sold for its benefit, or that its claim be paid in full with interest. The receiver filed a cross-bill to quiet the bank's title to the bonds. The District Court dismissed the bill and entered a decree for the receiver on the cross-bill. The Circuit Court of Appeals affirmed the decree.

On certiorari this was affirmed by the Supreme Court in an opinion by Mr. Justice Brandeis. The Railway contended that the bank had power to make the pledge; that if it had not power, the receiver was not in position to question the validity of the pledge; and that if he is not estopped, he may not disaffirm without returning the consideration which the bank received. Rejecting these arguments, the Court first pointed out that there is no grant of power to make such a pledge, and that powers not conferred by Congress are denied.

> National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the Act under which national banks are organized constitutes a complete system for their government . . . Confessedly the power to pledge assets to secure a private deposit was not granted in specific terms. The contention is that this power is incidental to the general grant of powers "necessary to carry on the business of banking . . . by receiving deposits;" and, hence, is implied.

No basis for implication of such power was found.

In addition to the lack of power, the Court also called attention to the fact that to permit such pledges would be inconsistent with many provisions of the National Banking Act, and with the policy of equal treatment which it is designed to foster. In this connection the opinion stated:

> To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. . . This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. . . The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection. Thereby the legitimate expectations of a great body of the depositors are defeated and confidence in the fairness of the national banking laws and administration is impaired. It is no answer to say that the other depositors are benefited by the increased resources which the pledge brings to the bank, or at least are not harmed, since the new funds take the place of the securities pledged and are available to meet liabilities. The immediate safety of unsecured creditors depends on the bank remaining open and solvent; the pledge reduces the fund of quick assets available to meet unusual demands without any assurance that the deposit will be used to replenish this fund.
>
> The fact that this bank had frequently secured private deposits by surety bonds lends no support to the contention that the power to pledge assets is necessary to carrying on the business of deposit banking. Such a practice would likewise be a departure from the policy of equal treatment of depositors; but the loss to other depositors resulting from such action would be far less serious. A pledge withdraws capital assets, while the giving of a surety bond merely increases the bank's expenses. There is, however, no

*Assisted by James L. Homire

finding that among national banks there exists the practice of securing by surety bonds some private deposits. If there has been such a practice, it must have been a secret one; for reference to it has not been found in either official reports, or the books on banking or other publications dealing with financial affairs. Whether a national bank could legally engage in such a practice we have no occasion to decide.

In regard to the bank's power to make the pledge, the Railway argued further that, since the relation between the bank and its depositors is that of debtor and creditor, and since the bank may borrow money and pledge its assets therefor, it may also pledge assets to secure a private deposit. This argument was rejected as unsound, in failing to take into consideration the fundamental distinction between loans and deposits. As to this argument, MR. JUSTICE BRANDEIS said:

> The fallacy of this contention has been many times exposed. The difference between deposits and loans is fundamental and far reaching. The amount of the deposits is commonly accepted as a measure of the bank's success; an increase of deposits as evidence of increased prosperity. The depositor does not think of himself as lending money to the bank. The modern deposit grew out of the older form of deposit in which the fund was held separate and intact, and the sole purpose of the deposit was safe-keeping. Safe-keeping is still a very important function of deposit banking; and from the point of view of most depositors the chief one. Borrowing by a bank (as distinguished from a re-discount) is commonly regarded as evidence of weakness. Often the loan is made in the hope of averting insolvency. Loans made by one bank to another commonly involve a pledge of assets, since only upon such a condition is the transaction possible.

In conclusion, the Court briefly discussed the questions of estoppel and the necessity for restitution as a condition for the setting aside of the pledge on grounds of invalidity. The Railway's contentions involving these theories were also rejected.

The case was argued by Mr. M. E. Clinton for the petitioner and by Messrs. Thornton Hardie and Henry S. Hackney for the respondent.

Banks and Banking—Power of National Banks to Pledge Assets to Secure Deposits of a City

National banks have power to give security for deposits made by a state or political subdivision thereof only of the same kind that state banking institutions may give for such purpose. It is found not to be established under Illinois law that state banks in Illinois have power to pledge their assets to secure the deposit of funds of political subdivisions of the State.

City of Marion, Illinois, v. Sneeden, Adv. Op. 521; Sup. Ct. Rep., Vol. 54, p. 421.

In this opinion a further question as to the power of a national bank to pledge its assets to secure deposits was considered. The deposit here involved money belonging to the City of Marion, Illinois, deposited by the treasurer of Marion in the City National Bank of Herrin. The treasurer was required by the state law to deposit funds of the city in a bank selected by certain officers of the city. The law further provided that any such bank "shall also execute a good and sufficient bond with sureties to be approved by the president" of the city council, "and conditioned that such bank will keep and account for and pay over said money." The Fidelity and Casualty Company of New York agreed to become surety on the treasurer's bond if he would procure a bank to give satisfactory collateral security for the repayment of the deposits of public moneys. The City National Bank of Herrin agreed to do this, and deposited negotiable bonds of par value of $23,000 to secure the city's deposits. The bank later failed and a receiver was appointed for it.

The receiver sued in a federal court to have the pledge declared *ultra vires* and void; to have the bonds delivered to him and to enjoin the city, its treasurer and the bank holding the bonds from disposing of them. The District Court dismissed the bill, but its decree was reversed by the Circuit Court of Appeals, one judge dissenting. On certiorari the decree of reversal was affirmed by the Supreme Court in an opinion by Mr. Justice Brandeis.

The opinion in *The Texas & Pacific Railway Co. v. Pottorff,* decided the same day, declaring that the Act of 1864 did not confer power to pledge assets to secure any public deposits except those made under Section 45 by the Secretary of the Treasury, was first cited in connection with the general question of power to pledge assets to secure public deposits.

The effect of the 1930 amendment of Section 45 of the National Bank Act of 1864 was then considered in relation to the Illinois law. The amendment added in 1930 added the following to Section 45:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Although it was recognized that the Illinois law authorizes state banks to pledge assets to secure deposits of the State, a distinction was noted between such deposits and deposits of political subdivisions of the State. As to the Illinois law on the subject, MR. JUSTICE BRANDEIS said:

> Banks organized under the laws of Illinois do not appear to possess the power of pledging assets to secure the deposit of public moneys of a political subdivision of the State. Illinois corporations have only such powers as are conferred by statute either expressly or by implication; and only those powers are conferred by implication which are reasonably necessary to carry out the powers expressly granted. . . No Illinois statute confers in express terms upon banks organized under its laws either the general power to pledge assets to secure a deposit; or the general power to pledge assets to secure public deposits. A statute confers in terms the power to pledge assets to secure deposits of the State but there is none which so confers the power to pledge assets to secure public deposits of a political subdivision of the State. No reported decision rendered by any Illinois court since the enactment of the General Banking Law of 1887 holds that the alleged power exists as one incidental to the business of deposit banking. Nor is there any evidence that in Illinois such power is necessary in the conduct of the business of deposit banking.

Ward v. Johnson, 95 Ill. 215, decided in Illinois prior to the Illinois General Banking Law of 1887, cited as authority for the proposition that Illinois banks have power to pledge assets to secure deposits, was also discussed. But the facts involved in that case, and the fact that it has never since been referred to in the Illinois decisions, led to the conclusion that it is not established in Illinois that state banks there have power to make a valid pledge of assets in a case such as that under review.

The case was argued by Messrs. Richard Mayer, William Catron Rigby and Henry F. Driemeyer for the petitioner and by Messrs. H. V. Ferrell and John A. Hay for respondent.

Evidence—Presumptions—Woman's Procreative Capacity

In determining the taxable value of an estate under the Revenue Act of 1918, the amount of the residuary estate devised to charitable institutions should be deducted from the gross estate, where the residuary estate is devised to

such institutions upon the death of the testator's daughter without lawful issue, if it appears that the daughter was incapable of bearing issue.

The presumption that a woman is capable of bearing children as long as she lives is not conclusive, and must yield to proof that she is incapable of bearing children.

United States v. Provident Trust Co., Adv. Op. 510; Sup. Ct. Rep., Vol. 54, p. 389.

This case involved a question as to the proper method of determining the taxable value of a decedent's estate under the provisions of the Revenue Act of 1918. The decedent by will devised the remainder of his estate, after certain bequests, to his daughter for her life, and upon her death to her lawful issue. The will further provided that upon the daughter's death without issue, the residuary estate should be distributed among certain charitable institutions. All of the latter were within the class to which bequests are deductible from the gross estate, under the statute.

The facts were that seven years before the will was probated the daughter had undergone an operation removing her uterus, Fallopian tubes and both ovaries. The Court of Claims specifically found that after the operation the daughter could not have become pregnant nor could she have given birth to a child. Accordingly, it held that the executor, respondent, was entitled to recover $17,202.66, on account of taxes paid by reason of failure to allow the deduction of the charitable bequests from the gross estate.

On certiorari the judgment of the Court of Claims was affirmed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

The Government contended that in view of the restriction in the will in respect of issue the value could not be determined in the manner adopted, since the law, without regard to the fact, conclusively presumes that a woman is capable of bearing children as long as she lives; and that the presumption controls in a case where the organs of reproduction have been removed no less than where the question turns on age alone, or on conflicting evidence of medical opinions.

In rejecting this argument, Mr. Justice Sutherland called attention to the fact that the rule in respect of irrebuttable presumptions rests upon grounds of policy so compelling as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof. Citing *Best, Presumptions of Law and Fact*, to the effect that such presumptions are to be restricted rather than extended, and pointing to the advance in medical science since the rule of presumption was formulated, MR. JUSTICE SUTHERLAND said:

> The foregoing observations are peculiarly apposite to the phase of the subject now under review; for, as suggested by counsel for respondent, the presumption here involved had its origin at a time when medical knowledge was meager, and many centuries before the discovery of anaesthetics and, consequently, before surgical operations of the kind here involved become practicable. It was not until a comparatively recent period, therefore, that the effect of such an operation was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children.

Though the presumption is generally regarded as conclusive where the element of age alone is involved, authority was cited to the effect that even in such a case the presumption has not been universally held to be conclusive. As to this the Court said:

> The presumption generally has been held to be conclusive when the element of age alone is involved, albeit Lord Coke's view that the law seeth no impossibility of issue, even though both husband and wife be an hundred years old (Coke on Littleton, 551; 2 Blackstone Commentaries 125), if now asserted for the first time, might well be put aside as a rhetorical extravagance. But the presumption, even where age alone is involved, has not been universally upheld as conclusive or applied under all circumstances. It has been followed to a greater extent in this country than in England, though even here exceptional cases are to be found; and in England such cases are very numerous. It does not seem necessary to review the decisions in either jurisdiction. It is enough to say that the English courts have treated the rule as possessing a considerable degree of flexibility and have refused to give it a conclusive effect in a large number of cases; while the American courts, adhering to a more rigid view, have applied the rule more generally.

In support of the ruling, it was further noted that to hold the presumption conclusive under the circumstances would tend to defeat the policy of Congress, as embodied in the Act, to encourage charitable bequests.

> The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof. Moreover, the case does not involve the rule against perpetuities, the devolution of property, the rights or title of living persons in or to property, or any other situation such as constituted the background of practically all the decisions which have sustained the conclusiveness of the presumption. We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests. . . And, in that view, we well may assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation. . .
>
> The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. . . Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason.

The case was argued by Solicitor General Biggs for the petitioner and by Mr. Joseph Carson for the respondent.

Negligence—Contributory Negligence in Railway Crossing Accidents—Care Required of Highway Traveler

The driver of a vehicle is under no absolute duty, as a matter of law, to get out of his vehicle and reconnoitre at a railroad crossing before crossing the same. In an action for damages sustained in a crossing accident it is for the jury to determine, under the circumstances of the case, whether reasonable care requires the driver to take such a precaution, and it is reversible error to direct a verdict against the driver on the ground that failure to take such precaution was contributory negligence.

Pokora v. Wabash Railway Company, Adv. Op. 700; Sup. Ct. Rep. Vol. 54, p. 580.

In this opinion, by MR. JUSTICE CARDOZO, the Court, on certiorari, reversed a judgment of a Circuit Court of Appeals, affirming a judgment on directed verdict for the defendant. The petitioner was injured while crossing the respondent's railroad tracks at Springfield, Illinois. Petitioner brought action to recover

damages from the respondent. At the trial in the District Court a verdict was directed for the respondent on the ground that the petitioner had been guilty of contributory negligence. In affirming the judgment the Circuit Court of Appeals (one judge dissenting) relied on *B. & O. R. Co. v. Goodman*, 275 U. S. 66.

The collision occurred at Edwards and Tenth Streets, in Springfield. At that point the respondent has four tracks running along Tenth Street, north and south; to the east is a switch track, then a main track, and two switch tracks to the west. Pokora had stopped on the easterly side intending to get ice from an ice depot on the northeast corner. Since many trucks were ahead of him he decided to cross and get ice at another ice depot on the southwest corner. As Pokora left the northeast corner, where his truck had been stopped, he looked to the north and listened for approaching trains. This he did about 10 or 15 feet east of the switch. There was neither bell nor whistle. A string of box cars, 5 to 10 feet from the north line of Edwards Street, cut off the view to the north. When Pokora reached the main track a passenger train struck him. There was nothing in the record to show that the track to the north was visible for any substantial distance, or that the train could have been seen before escape had been cut off.

Under these circumstances the Court was of the opinion that it was for the jury to decide whether reasonable care required some precaution in addition to stopping, looking and listening. In regard to this MR. JUSTICE CARDOZO said:

> In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. . . Pokora made his crossing in the day time, but like the traveler by night he used the faculties available to one in his position. . . A jury, but not the court, might say that with faculties thus limited he should have found some other means of assuring himself of safety before venturing to cross. The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle. *L. & N. R. Co. v. Summers*, 125 Fed. 719, 721; Illinois Revised Statutes, (1933 ed.) c. 114, paragraph 84. Indeed, the statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. . . All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men.

(The statute cited requires bell and whistle to be sounded at highway crossings.)

The Court then adverted to the opinion of MR. JUSTICE HOLMES in the Goodman case. Affirming that the result reached in that case was correct, the Court, however, discussed a part of the opinion in that case which has been the subject of controversy.

> There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible. With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

In dealing with the effect of the *Goodman* case, MR. JUSTICE CARDOZO pointed out that there was no occasion to determine whether there is a duty to stop before crossing a railroad track, since Pokora had stopped. The only question requiring decision was whether there is a duty on the driver to get out of his vehicle and reconnoitre. In this connection the Court stated its reluctance to lay down standards of conduct for extraordinary situations. As to this, and as to the limitation on the *Goodman* case MR. JUSTICE CARDOZO said:

> Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. . . Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.
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> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. . . The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.

The case was argued by Mr. William St. J. Wines for the petitioner and by Mr. Homer Hall for the respondent.

Conflict of Laws—Contractual Limitation on Liability of Surety—Effect of Statute of Another State—Due Process

The liability of a surety, limited by contractual limitation valid in the state where made, cannot be enlarged by statute in another state, where action is brought against the surety on the contract, under the due process clause of

the Fourteenth Amendment, even though the losses sought to be enforced against the surety occurred in the latter state, where its interest in the transaction has but slight connection with the substance of the contractual obligation.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., Adv. Op. 767; Supt. Ct. Rep. Vol. 54, p. 634.

This case involved the validity of a Mississippi statute as construed and applied by the Supreme Court of that State in its relation to a fidelity bond entered into in Tennessee. Hartford Accident & Indemnity Company, a Connecticut corporation, made a fidelity bond with Delta & Pine Land Company, plaintiff, in Tennessee whereby the indemnity company agreed to pay the plaintiff pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee 'in any position, anywhere," for a certain period. The liability of the defendant company was conditioned on three events: loss under the policy, notice to the appellant at its home office within three months after discovery of the loss, and presentation of the claim within 15 months after termination of the suretyship.

The plaintiff brought suit in Mississippi, where the defendant was licensed to do business, to recover from the defendant $2,703.79, the amount of loss it had sustained by reason of defalcations of its treasurer. All the losses occurred in Mississippi. The defendant pleaded as a defense that the claim had not been filed until more than 15 months after the termination of the contract of suretyship for the treasurer; that the limitation of 15 months in the policy was violative of no law of Tennessee, where the contract was made; and that full faith and credit must be given to the contract in Mississippi in accordance with the requirements of Article IV, Section 1, Article I, Section 10, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The plaintiff demurred to the plea on the grounds: (1) that the contract is governed by the law of Mississippi; (2) that the Mississippi statute of limitations governs the contract, and that the 15 months limitation in the contract is violative of the state statute of limitations and of public policy in Mississippi, and its courts are not required to give effect to the contract provision.

The Mississippi courts held for the plaintiff. The Supreme Court of Mississippi, conceding that the limitation was valid in Tennessee, where both plaintiff and defendant had offices and where they had made the contract, and presumably intended that it should be performed, concluded, nevertheless, that a Mississippi statute made the instrument a Mississippi contract and annulled the contractual limitation.

On appeal, this was reversed by the Supreme Court in an opinion by MR. JUSTICE ROBERTS, on the ground that the statute as construed and applied violates the due process clause of the Fourteenth Amendment. In this connection the Court pointed out that the Mississippi statute, under Amendment XIV cannot operate extraterritorially, and that that State, on grounds of public policy, cannot enlarge an obligation created elsewhere. In regard to this MR. JUSTICE ROBERTS said:

> The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory . . .; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. . . Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. . .
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> It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws, . . . it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. . . Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. . . But clearly this is not such a case.

The case was argued by Mr. William H. Hall for the appellants, and Mr. Garner W. Green for the appellee.

Taxation—Validity of State Tax Under Due Process Clause

The Washington excise tax on the sale of butter substitutes is not violative of the due process clause of the Fourteenth Amendment, even though it operates as a burden on one industry and affects beneficially another industry, since there is no proof that the tax is a mere disguise under which confiscation is effected or some other unconstitutional power exercised.

Mangano Co. v. Hamilton, Adv. Op. 712; Sup. Co. Rep. Vol 54, p. 599.

The appellant challenged the constitutional validity of a statute of Washington which levies an excise tax of fifteen cents per pound on all butter substitutes sold within the State. Every distributor of butter substitutes is required to file a certificate with the Director of Agriculture containing the name under which the distributor is doing business, and other specified information. Sale of any butter substitute is forbidden until such certificate is furnished. The act provides that the tax shall not apply to substitutes sold for export to any other state, territory, or nation; and any payment which would constitute an unlawful burden on the sale or distribution of such substitutes in violation of the federal Constitution or the laws of the United States is excluded from operation of the act.

The appellant, a Washington corporation, has been for many years engaged in importing and selling "Nucoa," a form of oleomargarine. Prior to the enactment of the act it derived a large net profit from sales in the state. Since then, claiming the tax to be

prohibitive, it has made no intrastate sales. "Nucoa" is a nutritious and pure article of food, with a well established place in the dietary.

Suit to enjoin enforcement of the statute was brought by the appellant in a federal court, and hearing was had by three judges under §266 of the Judicial Code, as amended. The court dismissed the bill. On appeal the decree was affirmed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

Of the several contentions raised by the appellant that grounded on the due process clause of the Fourteenth Amendment was chiefly considered. With respect to this the Court pointed out that a taxing statute may not be stricken down by the courts, even though the tax may burden one class of business enterprise in such a way as to benefit another class, provided the tax is for a public purpose and is not a mere disguise for the exercise of a forbidden power. The relation between the taxing power of the States and the due process clause was thus explained:

> Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. . . Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the federal Constitution to the state. The present case does not furnish such a demonstration.
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> The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the ten per cent. tax imposed upon the notes of state banks involved in *Veazie Bank v. Fenno*, 8 Wall 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

In the light of these principles, no ground was disclosed for holding the tax invalid.

> The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used. . . If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank* case, where it was urged that the tax was "so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank"; in the *McCray* case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish* case, from which we have just quoted; and in the *Child Labor Tax Case*, where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden.
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> From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the law makers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case.

The case was argued by Mr. Otto B. Rupp for the appellant, and by Messrs. E. P. Donnelly and Philip D. MacBride for the appellees.

Insurance—Double Indemnity—Status of Insured as Passenger on Common Carrier

A traveler who has purchased a ticket entitling him to ride on a train of a common carrier and is killed while boarding the train as it is in motion leaving the station is a passenger within the meaning of a double indemnity clause in an insurance contract stipulating payment of double the amount of the policy, if loss of life results from an injury "sustained by the insured (1) while a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

Aschenbrenner v. U. S. Fidelity & Guaranty Co., Adv. Op. 683; Sup. Ct. Rep. Vol. 54, p. 590.

In this opinion, by MR. JUSTICE STONE, the Court construed a provision of an accident insurance policy providing for double indemnity to the insured in case injury is sustained while a passenger on a common carrier. The policy provided for payment of double the amount of the policy "if such injury is sustained by the insured (1) while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service."

The insured had purchased a ticket entitling him to be carried on a train. He arrived at the station as the train was moving out of the station at the rate of 7 to 10 miles per hour, but while it was still opposite the platform and while the vestibule doors were still open. He jumped on the lower step of the car and, holding the hand rail, continued there while the train moved about 20 feet, with a small part of his body or clothing projecting beyond, until it brushed against a bystander. In this manner the insured lost his hold and sustained injuries resulting in death.

Under instructions of the District Court for Northern California, that if the insured held a ticket entitling him to ride as a passenger, and, in attempting to board the train while in motion, stood with both feet on the step, he was a passenger and entitled to recover double indemnity, the jury found for the plaintiff. The Circuit Court of Appeals reversed the judgment, holding that insured was not a passenger.

On certiorari this was reversed by the Supreme Court. In his opinion MR. JUSTICE STONE recognized that courts have sometimes said, in personal injury cases, that the implied invitation to board a train is withdrawn from one attempting to board a moving train and that the carrier's duty to exercise a high degree of care does not attach in such circumstances because one seeking to board a train does not become a passenger until he reaches a place of safety. After discussing this and other distinctions sometimes made in personal injury cases against carriers, the Court

concluded that such rules did not govern here, and that, to give effect to the rule that an insurance provision susceptible of two constructions should be construed favorably to the insured, the insurer must be held to double indemnity. In this connection MR. JUSTICE STONE said:

> The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted . . . and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports. . .
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> We think the word "passenger" can not be restricted to the technical meaning which may be assigned to it by the law of common carriers, for it also has a common or popular meaning which would at least include the insured who, with a ticket in his possession, was riding on the steps of the train. In its usual popular significance the term, when applied to one riding a train, indicates a traveler, intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey. . . None of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier. While for the purposes of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common.
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> That the stipulation to be construed is one for double indemnity calls for no different conclusion. It has been argued that such a provision contemplates a risk which is comparatively slight, and that therefore it should be strictly construed. It may be that the insurer assumes little additional risk; but the terms of the clause disclose an inducement to insure set forth in attractive detail. The policy contains no exceptions exempting the insurer from liability if the injury is caused by negligence of the insured, or restricting the liability to accidents occurring only after a point of safety has been reached, and the steps of a car are specifically included in the place where injury insured against may occur. Nothing in the policy gives any hint that words in this clause are used more narrowly than those in any other. The insurer has chosen the terms, and it must be held to their full measure in this clause, as in any other, whether its promise be for more or less.

The case was argued by Mr. Randell Larson for the petitioner and by Mr. George A. Work for the respondent.

Taxation—State Excise Tax on Use of Gasoline—Validity

The Iowa tax on the use of gasoline as motor fuel within the state is valid as an excise tax, and is not a tax on the importation of gasoline into the state imposing an undue burden on interstate commerce.

Monamotor Oil Co v. Johnson et al., Adv. Op. 706; Sup. Ct. Rep. Vol. 54, p. 575.

In this case the appellant sought an injunction to restrain enforcement of a tax levied by Iowa on motor vehicle fuel. On final hearing the bill was dismissed. In order to raise revenue for highway improvements the State imposed a license fee of two cents per gallon on all motor fuel "used or otherwise disposed of in this State for any purpose whatsoever"; and directed that "any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid." A later statute imposed an additional license fee of one cent per gallon. The tax is collected through distributors of gasoline, who are required to keep posted in a public place a placard showing the total sale price per gallon, including the fee, and to have printed on the placard the words "state license fee included." Every distributor is required to report monthly to the state treasurer the total gallons imported in the preceding month, and to remit the fee relating to the same.

A provision is included enabling one purchasing fuel for a purpose other than fuel for a motor vehicle to obtain a refund of the amount of the tax paid with respect to it.

For some time the appellant complied with the act and paid the tax. About May, 1932, a controversy arose between the taxing authorities, due to the falsification of certain invoices and waybills to show forty tank cars of gasoline as "gas-oil." On these no tax was paid. The State brought criminal proceedings against certain officers of the corporation and a civil proceeding to recover the unpaid tax, and also revoked the appellant's license. While the civil suit was pending, the appellant brought the injunction suit under review, contending that since gasoline moving from its refinery at Carter Lake, Iowa, to other Iowa points had to pass through Nebraska, it was free from tax, since the tax, if imposed, would be a burden on interstate commerce.

This contention the Court rejected. As to it MR. JUSTICE ROBERTS emphasized the point that the tax is imposed upon the use of gasoline as a fuel for vehicles using state highways, and that the distributor is merely the State's agent for collecting the same. In elaboration of this view the opinion states:

> There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, Section 8, cl. 3 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. . . It is not laid upon the importer for the privilege of importing . . . but falls on the local use after interstate commerce has ended. . . The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. . . The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the state. To prevent evasion the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; but as some purchasers employ the gasoline for a purpose other than the propulsion of a motor vehicle, and as the burden of the tax has been passed on to them as well as those who desire a motor fuel, provision is made for a refund to the former. Since the law declares that the levy is only upon use of motor vehicle fuel in the state, and the intent is not to affect interstate commerce, the state treasurer properly permits distributors to deduct as a credit from the gasoline returned as imported into the state in any calendar month that which has been exported from the state by the distributor. Thus gasoline passing through the state to reach its ultimate destination is exempt. It is of course true that as the report is required on the twentieth of the calendar month for transactions of the preceding month, there may at times be gasoline received in the month covered by the report which has not been exported by the twentieth of the succeeding month; but the distributor is entitled to a credit for such exportation in his report made in the next month, and the mere fact that he cannot claim an anticipatory credit for gasoline not yet exported, but intended so to be, seems to us to be too slight a burden to be of any moment, or to raise a substantial constitutional question.

The Court rejected also the appellant's contentions that the tax denies to it the equal protection of the laws, in violation of the Fourteenth Amendment. Among several contentions made on this ground was

(*Continued on page* 318)

BAR ASSOCIATIONS WORK ON COORDINATION SUBJECTS

Coordination Movement Has Been Greatly Strengthened by Activities of Some of the More Important Associations — Movement Emphasized in Meetings Held in New York City, Utah, Florida and Michigan — Plan of Discussion Followed in Last Named State—Probably More General Interest Manifested in Enforcement of Criminal Law Than in Other Subjects on National Program — Constitutional Proposals in California — Crime Committee of Lawyers and Laymen Begins Work in Minnesota

THE announced purpose of the American Bar Association in employing the questionnaire technique to secure information from the profession on the subjects of criminal law, judicial selection, unauthorized practice and legal education, was to stimulate activity on the part of the bar associations in these directions and induce constructive action by them. A fair cross section of the opinion of lawyers as to where the emphasis should be placed in improving criminal law enforcement is already available, and a drive is now under way to bring in the answers from those active bar associations which have not already reported. Judicial selection and unauthorized practice questionnaires were to be returned by April 1st, but many committees are still working on these interrogatories and have not yet responded. It is requested that the officers of all associations which are undertaking to send in completed answers check up at once and find out if their committees on these subjects have sent in the questionnaires to the American Bar Association, and, if not, take immediate steps to produce this result.

The coordination movement has been greatly strengthened by the activities of some of the more important state bar associations. At the time the New York State Bar Association met in New York City in January, a meeting of the officers of a large number of the local associations was called by Charles H. Strong, a Vice-president of the national association and Secretary of the Association of the Bar of New York City, for the express purpose of discussing ways and means of promoting the National Bar Program. At the midwinter meetings of the Ohio, Indiana and Wisconsin bar associations, special sessions, attended by especially invited representatives of local associations, were devoted to an exposition of the coordination plan and a discussion of the particular subjects designated under it. At the third annual meeting of the Utah State Bar, one of the more recent of the incorporated bars, the President's address was directed mainly to the progress which had been made in the four-point program of the American Bar Association, and reports from committees on these four subjects were made. The March meeting of the Florida Bar Association emphasized coordination, and the progress which was being made over the country was reported there by President Earle W. Evans.

Early in March President Carl V. Essery of the Michigan State Bar Association called together at Detroit representatives of the locals in that jurisdiction for a "Bar Coordination Meeting", which was devoted in large part to the general subject of coordination and to the particular topics of the National Bar Program. That meeting may well serve to suggest to other state associations possibilities of securing cooperation and arousing interest on the part of local associations. The splendid representation present included 29 out of 32 active associations in the state. The first session, held in the morning, was given over to a discussion of local bar association problems and the relation of local bar associations to the state and national associations. The following specific questions were discussed:

1. In what ways can the State Bar Association aid the Local Bar Associations?
   a. Committee work, e. g., work of local committees on illegal practice, work of local committees on public relations, etc.
   b. Providing a clearing house for suggestions as to reforms in the field of administration of justice
      (1) Proposed legislation
      (2) Proposed changes in court rules.
   c. Programs for local meetings.
   d. The Speakers' Bureau.
2. Suggestions from representatives of Local Bar Associations as to the service which the State Bar Association should render in connection with organizing district meetings.
3. Suggestions for the program of the next annual meeting of the State Bar Association.

In the afternoon the conference split up into four sections, each of which took up a subject on the National Bar Program. The outline for these discussions was as follows:

Section Meeting on Criminal Law and Its Enforcement

1. The desirability and practicability of removing prosecuting attorneys from the influence of politics, to some degree, at least, as by increasing their terms, by provision for their appointment instead of election, by restrictions upon their rights to run for political office after expiration of their terms, by appointment for judicial districts instead of for counties, etc.
2. The manner of selection of juries.
3. The advisability and possible methods of transferring police functions from the rapidly shifting personnel of sheriff's departments to a more permanently established police.
4. A consideration of the proper answers to the American Bar Association's questionnaire on enforcement of the criminal law.

Section Meeting on Unauthorized Practice of Law

1. Participation in Illegal Practice by Members of the Bar.
2. Practice before Administrative Boards and Commissions.
3. Selection of Cases and Remedies.
4. Practical Phases of the Trust Company Problem.
5. A discussion of the questionnaire submitted in connection with the National Bar Program.

Section Meeting on Judicial Selection and Tenure of Judges

1. Methods of selection of judges for our courts of record. General discussion.
   (a) Elective method—present system.
   (b) Elective method—non-partisan ballot system.
   (c) Appointive method:
      (1) By executive.
      (2) By incorporated bar.
      (3) Combination of (1) and (2).
      (4) Other methods.

2. Reports from the several local bar associations and judicial circuits of the state as to present sentiment in the respective sections. The results accomplished and progress made. What further work is required and what assistance, if any, is desired from the State Bar Association? Summary of reports of local bar associations.

3. Method of accomplishing the necessary constitutional amendments and legislation to put into effect the proposed change in the system of judicial selection.

4. The nature and extent of bar association activities in connection with the selection of judges under our present system.

5. A discussion of the questionnaire submitted in connection with the National Bar Program.

Section Meeting on Legal Education and Admission to the Bar

1. Character:
   (a) Examination by local committees of the Bar.
   (b) A questionnaire, to be answered by applicant, giving main facts relating to parents and perhaps grandparents, education of applicant, special interests of applicant, reading or other recreation.
   (c) Reason of applicant for wishing to practice law.
   (d) Conduct, in high school and college, of applicant, to be ascertained by direct correspondence with the institutions.
2. Proposal for apprenticeship of from one to five years.
3. Requirement of renewal of license to practice, at intervals of from one to five years.
4. Intellectual qualifications.
   (a) Type of question and answer expected.
   (b) Proposal to reduce number of subjects and questions, with a view to requiring more exhaustive, careful and full treatment of answers.
   (c) Auxiliary examination of the "yes" and "no" type.
   (d) Possibly oral examination, to be carefully conducted along formal determined lines.
   (e) Scholastic record in high school and college.
5. Elimination of repeaters at Michigan examinations.

Probably more general interest throughout the country has been exhibited in the subject of improving the enforcement of the criminal law than in any of the other problems on which the American Bar Association is seeking to focus the attention of the profession. It is generally recognized that it is impossible to formulate a pat solution which will solve the problem of crime. Nevertheless, many very constructive suggestions are being made. Four proposed amendments to the Constitution of the State of California, prepared by a committee of the State Bar, are of considerable importance and worthy of consideration by all committees dealing with this subject. The first recommendation, especially, providing for the creation of a State Department of Justice, seems to have great possibilities.

Wide differences of opinion on the part of the bar are evidenced by the criminal law questionnaires. In response to the interrogatory as to how the bar can be awakened to its responsibilities in the enforcement of criminal law for example, one committee replies that a direct descent of the Holy Ghost will be necessary. Another states that the most appropriate means is by stopping assaults on the bar as a body and punishing severely those members who fail in their duties, while a third and possibly more practical recommendation suggests the organization of a local crime council, consisting of a district judge, a city judge, a county prosecutor, a city prosecutor, chief of police, sheriff, several members of the bar association and several representatives of civic clubs, to study local crime conditions and to stimulate the activities of law enforcing agencies.

In Minnesota the crime committee of lawyers and laymen appointed by the President of the Minnesota State Bar Association, F. W. Murphy, and headed by Chief Justice John P. Devaney of the Supreme Court, has begun its activities and is vigorously attacking the crime problem. In appointing the committee, Mr. Murphy recognized the responsibility resting on the lawyers and also included in the committee prominent laymen of the state, because of the general insistence on the part of groups outside the legal profession that the courts have not met the demands upon them, and the legal profession has not measured up to its responsibilities. Mr. Murphy states that the answer to the problem must and will be found, and points out the necessity for an "intelligent and aroused public opinion, so powerful, and so insistent, that the criminal will find no place in which he can work his way by the use of ill-gotten gains in corrupting those who are so in need that they will forget their obligations as honest men and women."

One of the most active bar committees in the criminal law field has been that of the Association of the Bar of the City of New York, headed by Mr. George Z. Medalie. His permission has been received to reprint the answers of the committee and they are set forth in the belief that they will be of general interest to the bar and of assistance to other groups who are still working on the problem.

Criminal Law Enforcement in New York City

The following answers have been received from the Committee of the Association of the Bar of the City of New York and are published with its consent:

1. RELATION BETWEEN POLITICS AND CRIME

a. In your community, to what extent, and in what types of violations of the law, if any, do criminal offenders have sufficient influence to prevent their arrest and punishment?

In any type of crime but more especially in violations of the grade of misdemeanor or offenses less than misdemeanor triable in the inferior criminal courts. It is impossible to say to what extent political influence is used. Undoubtedly many cases have been influenced by improper considerations.

b. Is this influence generally exercised through the police, prosecutor's office or court?

The influence is exerted in connection with the police, the prosecutor's office and the court. In relation to the police such influence is not exercised so much to prevent arrest, except possibly in gambling cases, as it is to influence the police officer to "throw" the case. The method in the prosecutor's office is generally accomplished by failure to prosecute until the case becomes too stale to try. There are not many complaints of influence *in the*

courts in important felony cases. Undoubtedly the influence is used in the inferior courts with respect to minor offenses.

c. Are district leaders or other politicians financially interested in any criminal enterprises?

It is the general impression that they are, but it is not susceptible of proof without a thorough investigation.

d. To what extent have criminal elements been identified with election frauds, i. e., have gangsters or other notorious criminals been used in connection with election frauds?

Generally the gangster element is present and participates actively in connection with elections in certain sections of the city.

e. Have any of the situations referred to in a, b, c, or d above been the subject of special study in your community?

The most important study which has recently been made is the investigation of Judge Samuel Seabury in 1931 as to the Magistrates Courts of the City of New York. The federal district attorney has also, during the last two years, conducted a number of important grand jury investigations in connection with racketeering and election fraud cases, resulting in several trials and convictions.

f. What if any remedies have been proposed to meet any of the above situations?

Reorganization and consolidation of the criminal courts.

Various proposals of changing the method of the appointment of judges.

Improvement in the personnel in the Police Department and District Attorney's office.

(For a comprehensive review of many of the evils in the administration of the criminal law in New York City, and a program for their reform, see the report of Hon. Samuel Seabury to the Judges of the Appellate Division, First Department, dated March 28, 1932, a copy of which we are submitting with this questionnaire).

2. PROSECUTOR

a. Is the prosecutor's office in your community functioning satisfactorily in conducting investigations of either the commission of specific crimes or of the conduct of public officers?

The prosecutor's office has not been functioning satisfactorily for over ten years. The new District Attorney took office the 1st of January, 1934. While he is of the same dominant political party, the promises and assurances which he has publicly given, if carried out, should result in improving the conduct of this office.

b. Is the prosecutor's office in your community efficient in the conduct of criminal trials?

No—with a few exceptions.

c. If not, what reasons would you give for inefficiency as to either of above duties?

Professional attainments of the Assistant District Attorneys and the political character of their appointments.

d. Is the staff adequate?

In numbers, yes; in quality, no.

e. Does the personnel consist of trained, experienced, or otherwise competent assistants?

No—with some exceptions.

f. Does the office co-operate adequately with the police and other enforcing agencies?

It has not been cooperating adequately. The new District Attorney has promised to endeavor to adopt a system of cooperation between his office and the police which has been suggested to him by this Committee.

g. Is the policy of bargaining with offender for plea of guilty of lesser offense abused?

In general the taking of pleas for lesser offenses has not been abused. Of course, there have been cases where the taking of a lesser plea has been dictated by improper considerations.

h. Are forfeited bail bonds actually collected?

Not in most cases. In general, forfeitures are remitted if the defendant is subsequently apprehended or appears. In some cases forfeitures cannot be collected because of the inability of the surety to respond also.

i. Are the assistant district attorneys or other subordinate officers in the prosecutor's office primarily political appointees?

Yes.

j. Do you attribute any of the defects or inefficiency to the fact, if such is the fact, that the appointments are based essentially on political considerations rather than upon legal or other professional ability?

Yes.

k. Enumerate any other major defects in prosecutor's office.

We think that the two most serious defects in the district attorney's office have been (1) the lack of an able, courageous, politically independent and energetic district attorney and staff, and (2) the failure of the district attorney adequately to cooperate with the police and other investigating agencies in the investigation and detection of crime, and in failing to initiate investigations through his office. The policy of the district attorney's office has been to confine itself to the prosecution of cases "made" by the police.

(See statement of preliminary recommendations made by this Committee on December 27th, 1933, to the new District Attorney and Police Commissioner of New York City, a copy of which is submitted herewith).

3. POLICE

a. In the performance of their functions of crime prevention, detection and arrest of criminals would you grade the police and other enforcing agencies in your community as excellent, good, fair or poor?

In general, the performance of the Police Department has been good, according to old-fashioned standards, which are inadequate to deal with modern organized crime.

b. Are they subject to political control?

In many cases, yes.

c. To what extent, if any, are they subject to corruption, financially or otherwise?

We should say that the police, as a department, are not as generally subject to financial corruption as they are to political influence and interference.

d. Is the method of selection used calculated to secure desirable personnel?

The police are under the Civil Service. If prop-

erly administered, the method of selection should secure desirable personnel.

e. Have they security of tenure?

Yes.

f. Do they receive adequate compensation?

Yes.

g. What provision exists for police instruction?

In general we should say that the rank and file of the department are given adequate police instruction. There is, however, a serious lack of instruction in connection with the investigation of the more complicated, subtler, and widely ramified types of law violation, such as racketeering. The successful prosecution of such far-flung criminal enterprises requires the use of methods of investigation and resourcefulness of a much higher order than those which the ordinary police trained detective is capable of employing.

h. If inefficiency in police or other enforcing agencies exists, what reasons would you give for it other than those included in the above subdivisions of this topic?

The efficiency of the Department can be greatly improved (a) by having at its head a courageous, energetic and imaginative police commissioner, free from political control; (b) by establishing a bureau of intelligent and well-trained investigators, comparable to the Bureau of Investigation of the Federal Department of Justice, to handle racketeering cases and other complicated types of law violation; and (c) closer cooperation with the district attorney's office in the investigation of crime. (A new Police Commissioner has been appointed.)

i. Do they use modern methods of scientific crime detection, including fingerprint and photographic records?

Yes. Fingerprint and photographic records are used to the fullest extent and there is a clearance and exchange with the State Department of Correction at Albany, New York, for transmission to the Division of Investigation of the Department of Justice. The other and newer devices have not yet been developed to the extent that they are used in the Division of Investigation.

j. Is the system of fingerprints and photographs of defendants centralized in any state office of records and indentifications?

Yes. State Department of Correction, Albany, N. Y.

k. Are fingerprint and photographic records and other criminal information regularly forwarded to the Bureau of Criminal Records and Identification of the United States Bureau of Investigation at Washington, D. C.?

Yes.

4. LAWYER CRIMINAL

a. Are there lawyers in your community who give unethical assistance to criminals either before or after the commission of crime?

Yes.

b. What steps if any are being taken to check this type of activity?

The most important effort made in this regard was Judge Seabury's investigation into the Magistrates Courts in 1930. In our opinion much more could be done by the courts and by local bar associations than is being done to check this type of activity.

c. To what extent have the members of the bar who specialize in criminal cases organized bar associations of such specialized practitioners?

There is a local Bar Association composed of such lawyers, but it has little, if any, influence.

d. Is the practice of criminal law in your community confined to a comparatively small group of lawyers specializing in such cases?

While there is a considerable number of reputable general practitioners having occasional criminal cases, the bulk of the ordinary criminal business is handled by a comparatively small group of lawyers who do little other practice.

5. RACKETEERING

a. To what extent if any is the legitimate business of your community under the influence of racketeering?

In some fields to a considerable extent. No comprehensive or radical survey on the subject has yet been made. Trucking, food restaurant business, fur business and laundry business have been the subject of racketeering activity. The Attorney-General of the State has undertaken an investigation into powers recently conferred upon him by statute and he has invited the cooperation of the local district and United States Attorneys.

b. Does any racketeering exist in your community in connection with employer-labor relations, i. e., in labor unions, protective associations, etc.?

Yes.

c. Has the prosecutor's office in your community successfully dealt with racketeering either by means of appropriate investigation or prosecutive action?

No.

d. Has the United States Attorney for your district been more effective in combating racketeering than the local prosecutor?

Yes.

6. KIDNAPING

a. How many instances of kidnaping have occurred in your community since January 1, 1933?

None reported in New York County for 1933.

b. In how many cases have the principals in the kidnaping been apprehended?

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c. In how many convicted?

Three convictions for kidnaping and one for extortion on cases arising prior to 1933.

d. How many instances of attempted kidnaping or threats to kidnap persons unless payment was made (extortion) have occurred in your community since January 1, 1933?

The best information available on this subject has been obtained from the local office of the Division of Investigation of the Department of Justice, which, however, covers all of New York State, Connecticut and New Jersey and has not been segregated as to New York County.

During 1933 and to date that office had complaints of extortion in which the mails were used in 48 cases and only telephones in 12 cases. Twenty-six of these cases included threats of kidnaping; 45 of them, threats of bodily injury. Some

of these cases are characterized as mythical. No money passed in any of the cases on which the agents of the Division of Investigation worked.

e. In how many of such cases has the local prosecutor taken effective action?

As above.

7. CRIMINAL PROCEDURE

a. What parts of the Model Code of Criminal Procedure of the American Law Institute have been adopted in your state since 1930?

Rearrangement of subject matter and amendment of some of the provisions of the Code of Criminal Procedure of this state are now being considered by a special committee appointed by the Commission on the Administration of Justice, created by act of the legislature, and will be submitted to the Legislature at the present session.

b. Is there a committee of lawyers in your community or state studying the reform of criminal procedure?

Yes, an Advisory Committee delegated by the Commission on the Administration of Justice in New York State, which Commission was created by act of the Legislature.

c. If substantial improvements in criminal procedure, other than those enumerated under subdivision a, have been made in your state within recent years, what are these improvements and how have they been secured?

The general impression of Bench and Bar in New York is that the Code of Criminal Procedure of this State is adequate and up to date and in most respects served as a model for the Model Code. One of the most important provisions in recent years was the provision for speedy appeals in criminal cases, compelling the argument of criminal appeals within three months.

8. FEDERAL v. LOCAL ADMINISTRATION OF CRIMINAL JUSTICE

a. Has the United States Attorney for your district confined himself strictly to cases involving federal jurisdiction or has he extended federal criminal jurisdiction to include cases essentially local in character, i. e., where all of the material witnesses reside in the state, where all of the material evidence is in the state, where the crime violates a specific provision of the state criminal code?

Due to the ineffectiveness of the local authorities the tendency of the United States Attorney has been to take cognizance of crimes which should have been prosecuted under State Statutes and which were essentially local in character. These include election fraud cases, labor extortion cases, and corruption of local officials, prosecutions being conducted either under the Income Tax or Mail Fraud Statutes.

b. If such extension of federal jurisdiction has taken place, has federal action been more effective than local action in essentially similar cases?

Yes.

c. Has your state adopted the uniform statute dealing with the interstate rendition of witnesses in criminal cases, or is your state considering the adoption of such uniform statute?

Yes (See Section 618-a of the Code of Criminal Procedure, added by L. 1932, Chap. 255, in effect September 1, 1932.)

d. Are there any proposals pending in your state dealing with reciprocal interstate legislation for the purpose of overcoming the obstacles of territorial jurisdiction in the administration of criminal law?

No.

e. Are there any proposals pending in your state dealing with interstate compacts, with Congressional consent, for the purpose of overcoming the obstacles of territorial jurisdiction in the administration of criminal law?

No.

9. AROUSING THE BAR

a. By what means can the Bar in your community be awakened to its responsibility to improve the administration of criminal justice?

Primarily through the leadership of the local bar associations who have given sustained study to the problem, in making the facts known to the general public at frequent intervals, and by recommending reforms and seeing that they are carried out. The undersigned Special Committee is making this matter its principal objective and proposes by investigation and publicly expressed criticism to call attention to defects in the actual administration of justice in specific situations and as to specific crimes when, in its opinion, the authorities are not adequately performing their duties. (See annexed report of this Special Committee in connection with improved methods by District Attorney and Police Commissioner and the adoption of cooperative activities by them.)

b. What if anything is being done in your community at the present time to awaken the interest of the bar in this field?

This question is answered by 9-a.

10. OTHER PROBLEMS

a. Enumerate any other problems in the field of the administration of criminal justice which you consider more important than those above listed, such as possibly the requirement of unanimous verdicts, failure to provide for alternate jurors, the abuse of the constitutional privilege of self-incrimination, failure to provide for examinations before trial so as to prevent spurious alibis, etc.

While specific reforms, such as some of those suggested above and others to which the Committee plans to give attention with a view to legislative action, are undoubtedly important, more fundamental than any or all of them is the necessity for an unceasing fight towards the constant improvement in the caliber of personnel—judicial—prosecuting—and police. Unless and until the administration and enforcement of the criminal law is completely divorced from politics, in our opinion it is idle to suppose that a panacea for present conditions can be found in legislative action or other perennial reforms.

Please indicate which of these major problems is most important in your community, in the opinion of your committee, which is the second in importance and which is the third in importance.

First—Relation between Politics and Crime; second—Prosecutor; third—Police.

(Signed) SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

By GEORGE Z. MEDALIE, Chairman; JOHN M. HURLAN, CHARLES E. HUGHES, JR., JOHN McK. MINTON, JR., JOSEPH M. PROSKAUER, SAMUEL SEABURY, CLARENCE J. SHEARN, KENNETH M. SPENCE, CHARLES H. TUTTLE.

View of Milwaukee River Downtown, Looking South from the Wells Street Bridge. The Buildings are the Manufacturers' Home Building, First Wisconsin National Bank Building, Marshall and Ilsley Bank Building and the Trust Co. Building.

MILWAUKEE: ASSOCIATION'S MEETING PLACE FOR 1934

By James Maxwell Murphy
Member of Wisconsin Bar; Staff Writer for Milwaukee Sentinel

IN my monograph in the April issue of the Journal written to concentrate the attention of the far flung membership of the A. B. A. upon Milwaukee, where the next annual meeting will be held in August, I dealt with political and social aspects of the city's life.

In this article it is my design to relate and describe some of the physical attributes of the city and the state. In doing so I bear in mind that many of the delegates will want to combine a well earned vacation with the serious business of the convention, and relax afterwards in a land which has been hailed by millions as a paradise for the pleasure seeker.

The name Milwaukee (Manin-a-waukie) meant in the language of the Ouisconsin Indians "good and beautiful lands." In different dialects other Indians are known to have called the spot "Mannawaukie Leepe" or "gathering place by the river."

Two hundred years ago Father Marquette and Louis Joliet, on their way to the discovery of the Mississippi, passed along the west coast of Lake Michigan and, stopping, marked the present site of the city as Milwaukee bay. The map they made is now the proud possession of a Montreal convent.

In 1815 a young French-Canadian, Solomon Juneau, purchased a small trading post owned by his father-in-law, Jacques Vieau, and it is from this time and through Juneau's early leadership that the city dates its beginnings. Eager to capitalize upon the advantage of the village's location for development of industry and commerce, the pioneers laid such a true foundation that the community has grown into the twelfth largest metropolis in the United States.

Architecturally the city is a mixture of the old and the new. Towering skyscrapers in the downtown district stand beside commodious edifices of a previous era, built of a locally manufactured brick, which in the old days gained the community the name of the "Cream City."

Of prime interest to visiting lawyers is the new courthouse, a monumental and magnificent building which crowns a hill on the west side of the river. Under its roof are concentrated all the agencies of county governments. Through its stately corridors and courtrooms move throngs of attorneys and litigants in daily disputation.

Beside it stands the Safety Building wherein are housed the executive branch of the police department, the district (magistrate's) court, the municipal (criminal) court, the offices of the district attorney, the county jail, police station No. 1, and the various departments related to divers offices.

Near by is the Milwaukee Public Museum and Library, a palatial building, which lends an old world air to the Court of Honor on which it fronts. Famous for its early American characterizations, it also contains one of the most complete collections of Indian life in the United States.

Also near by is the Marquette University School of Law. Its students daily forsake the classrooms after the morning sessions to gain experience by observing the members of the Bar in action at the courthouse. Large numbers of them are employed as clerks in lawyers' offices.

A stone's throw from the courthouse are the famed Vocational School and the Municipal Auditorium where the A. B. A. convention will be held. The school is a magnet for educators from all over the world who have come to study its methods. It is a school for students who need to earn while being educated.

Located in the heart of the hotel, theater and shopping districts, the Auditorium is the hub around which all Milwaukee convention activities revolve. In the perfection of its physical appointments, facilities and service, it has set unmatched standards. Seven meeting halls are available, all under one roof, all acoustically ideal. They range in size from a seating capacity of 300 to 8,240. The building is equipped with a ventilating system which supplies washed and conditioned air at any temperature desired.

These buildings are all located to be a part of a great planning scheme. Together with others to be built they will form when completed one of the noblest civic centers in the United States.

Other centers of attraction and pleasure to the visitor are the Milwaukee Art Institute and the Layton Art Gallery; the Milwaukee bay and harbor, one of the finest on the Great Lakes, which may be viewed from Lincoln Memorial Bridge and the lower drive extending along the lake front for six miles; the Washington Park Zoo containing one of the largest municipally owned animal exhibits in America, where the animals are provided with surroundings similar to their native habitats, and the girdle of green parks which surrounds and embraces the city from every side.

Milwaukee has always been famous in the nation and throughout the world for its beer and notorious for its politics. In reality the beer industry while important forms but a small section of the city's industrial life.

It is the leading manufacturer of the following products: excavator machines, automatic frame machines which supply the world with automobile frames, tinware and enameling which brighten the kitchens of the world, electrical controls which "do the thinking" for electricity, toilet soaps, leather tanneries, steam and water turbines, Diesel engines, herringbone gears, tractors, ore crushers, outboard motors, motorcycles, flour milling ma-

chinery, and a host of other internationally famous products.

But I must not forget the restaurants (always of prime importance to lawyers) for which Milwaukee has long been justly famous, cafés noted not only for the excellence of the beer, but for the epicurean food and the character of the hosts. There are quaint eating houses for those who enjoy succulent food and modern cafés, with the accompaniment of music and merriment, for those devoted to gay surroundings.

Fifty-Seventh Annual Meeting, Milwaukee, Wisconsin

Monday, August 27, to Friday, August 31, 1934, Inclusive

Schedule of General Sessions and Section Meetings will be announced in a later issue of the JOURNAL.

Headquarters: Schroeder Hotel.

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin Beds for two persons	Parlor Suites
Schroeder Hotel ..	$3* to $5	$5 to $7	$6 to $ 8	$10, 12, 14
The New Pfister ..	$4 to $6	$5 to $8	$6 to $10	$12 up
Hotel Plankinton..	$3 to $4	$3.50 to $6	$5 to $ 8	$10 up
Hotel Wisconsin...	$3 – $3.50	$5 – $5.50	$6 – $ 7	$12 up
Republican Hotel...	$2 up			
Hotel Medford....	$2.50 – $3	$3.50 – $4.50	$5 – $5.50	
New Randolph ...	$2.50 – $5	$4 – $3		

Hotel Astor (Apartment Hotel) Kitchenette apartments from $5.00 up. Rooms without bath are available in all hotels at lower rates.
*Shower baths only.

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one* person. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Schroeder Hotel, Milwaukee, Wisconsin, bginning Tuesday, August 21, 1934.

Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

BILLS DRAFTED BY DEPARTMENT OF JUSTICE IN AID OF LAW ENFORCEMENT

BY JOSEPH B. KEENAN
Assistant United States Attorney General

SINCE the inception of the present program of the Attorney General of the United States, Homer S. Cummings, to aid law enforcement authorities in the suppression of crime, a number of legislative provisions have been drafted by the Department of Justice dealing with this problem. These bills have been presented in Congress and have reached various stages prior to enactment. The proposed measures can be classified in the following groups:

1. Those bills which provide for new substantive criminal offenses.

This includes legislation based on the federal power over interstate commerce, to protect commerce and industry from organized racketeers; legislation based on the federal power over the national banking system, to aid local law enforcement bodies to suppress the widespread robbery of banks; legislation to protect federal officers and penal institutions in cases such as the Dillinger pursuit or the Kansas City massacre, when federal and local police officers were mowed down by machine guns, or the Leavenworth prison riot, or the collusive jail break of Harvey Bailey, the Urschel kidnaper.

2. A bill which concerns regulation of the manufacture, importation and disposal of machine guns and small firearms.

This proposed legislation is based on the federal taxing power and the power over interstate commerce.

3. Those bills designed to improve federal court procedure in criminal cases.

4. A bill which grants to the state consent to enter into compacts for mutual assistance in the suppression of crime.

The Attorney General, appearing recently before the Committees on the Judiciary of the House and of the Senate to urge passage of these crime bills, made the following comment:

"I want to reiterate my firm belief that generally the suppression of crime is the obligation of the various states and local political subdivisions. It follows of necessity that I subscribe to the principle that it is distinctly not the duty of the Federal Government generally to preserve peace and order

in the various communities of our nation. Nor do I believe that there should be an extensive dual responsibility for the enforcement of law between the Federal Government and the state authorities. Such concurrent jurisdiction in criminal matters more often than not leads one law enforcement body to refer such matters of enforcement to the other, with the result that the work is not efficiently performed by either."

This has consistently been the policy of the Department of Justice in our effort to work out, as a practical solution, reasonably conservative operation on the part of the Federal Government in the attack upon those types of crime which have grown to such alarming proportions in recent years.

There has been an insistent demand made upon the Federal Government to lend its assistance to the prevention of a breakdown of law and order in our country. These requests have been received from all parts of this nation. They represent the thoughts of all classes of our citizens, and they include the most drastic remedies, such as demands that martial law be declared and military action taken to rid our country of the armed underworld, and that the Constitution be amended to transfer all police power to the Federal Government. Our main problem at present has been to determine to what limits federal authority should extend, not only within constitutional limitations, but also within practical bounds. Certainly, those who use modern means of transportation to escape from the scene of their crimes, those who employ swift methods of communication to avoid detection—the class of criminals who seek to earn their living by threats and violence, moving about from state to state to avoid apprehension—require the interposition of some coordinated central agency. It is to curb their depredations that these bills have been presented. The specific bills which have been recommended as are follows:

(1) S. 2248, H. R. 6926, a bill to protect trade and commerce against interference by violence, threats, coercion, or intimidation, is a proposed Federal anti-racketeering statute. In the past the Federal Government has prosecuted racketeers in the Federal Courts for incidental violations of law, such as mail frauds and income tax exasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-Trust Act. The Act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the Act by interpretations of the courts, the Act is not well suited for prosecution of persons who commit acts of violence, intimidation and extortion. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by one year in jail plus $5,000 fine.

The proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional power. Such restraints, if accompanied by extortion, violence, coercion, or intimidation, are severely penalized, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act "affecting" or "burdening" such trade or commerce if accompanied by extortion, violence, coercion, or intimidation. This bill has been passed in the Senate.

(2) S. 2845 is a bill to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, including securities and money. Similar legislation has been considered for a number of years but sufficient sentiment has never been aroused to obtain final passage of any such legislation. It is proposed to limit jurisdiction to property having a value of $5,000 or more, and to place the burden of proof of knowledge that the property so transported has been stolen, upon the defendant. Prominent members of the American Bar Association have appeared before previous Congresses in favor of a bill with similar provisions, and their efforts resulted in the passage of such a bill by the House in the 71st Congress.

(3) S. 2249, H. R. 6915 would apply the interstate commerce power of the Federal Government to extortion by any means. The purpose of this bill is to supplement the "Patterson Act" which makes it a Federal criminal offense to transmit threats through the mails, with attempts to extort any money or other thing of value. It has been passed in the Senate.

(4) S. 2253, H. R. 6913 is a bill which would make it unlawful for any person to flee from a state for the purpose of avoiding prosecution for a felony committed therein, or the giving of testimony in certain cases. Such legislation would not prevent the states from obtaining extradition of criminals as at present, but it is recognized that the states have never effectively solved the problem of roving criminals. Ability of Federal officers to follow a criminal from one state to other states, as provided in this bill, should furnish the basis for relief which is almost universally demanded. The bill, as passed in the Senate, assures that the defendant will be tried only where the "original crime is alleged to have been committed." It is possible that the House will insist on omitting from this bill the provision concerning fleeing witnesses, and will also limit jurisdiction to specific crimes of violence.

(5) S. 2252, H. R. 6918 is a bill which would amend the Act forbidding transportation of kidnaped persons in interstate commerce. One amendment would create a presumption that in the absence of the return of the person kidnaped and of the apprehension of the kidnaper, during a period of three days, such kidnaped person has been transported in interstate or foreign commerce, but such presumption is not conclusive. Another amendment would provide the death penalty if the kidnaped person is not released alive prior to the conviction of the kidnaper.

(6). S. 2841 is a bill which would make it a federal offense to rob banks operating under laws of the United States or any member of the Federal Reserve System. With the decrease in kidnaping and extortion cases, there has been an alarming increase in the robbery of banks by organized and well armed gangsters. At present, banking institutions in which the Federal Government is interested are protected from embezzlement and defalcation by a Federal criminal statute, and there would seem to be no logical reason why the Government should not also protect such institutions from robbery by force or violence. The penalty is cumulative if a dangerous weapon is used or a homicide or kid-

naping is committed in the course of the unlawful act. This bill has been passed by the Senate.

(7 and 8). S. 2080, H. R. 6611, and S. 2575 are bills which would provide punishment for killing or assaulting federal officers and for assisting in a riot or escape at any Federal penal institution. At the present time if a Federal officer, engaged in apprehending a criminal or in serving process upon him, is killed, there is no jurisdiction in the federal courts to try the person who commits the offense. Recent activities of notorious criminals who are serving sentences, and their allies, show the necessity of federal criminal legislation to assist in the proper administration of federal penal institutions. These bills have been passed by the Senate.

(9) H. R. 9066 is a bill which would regulate the importation, manufacture, and sale or other disposition of machine guns and small firearms by taxing manufacturers, importers and dealers in such firearms and by imposing a stamp tax on the sale or other disposal thereof. A number of other bills regulating the small firearms industry have been introduced in this Congress, most of which are based on the interstate commerce power. The above bill, based on the taxing power of the Federal Government, is analogous to the Harrison Anti-Narcotic Act. It will give the Federal Government regulatory control over manufacturers, importers, dealers and pawnbrokers in small firearms and machine guns and, after a period of time, should make it possible to ascertain by proper credentials the identity of the legitimate possessor of any small firearm and machine gun. It is not expected that this legislation will keep all revolvers, sawed-off shot guns or machine guns out of the hands of criminals. It is believed, however, that the law abiding citizen will be willing to undergo the slight restriction imposed upon him, and that the criminal elements will refuse to, thus laying a foundation for forfeiture of their weapons, and for imprisoning them for violating the provisions of this Act. This bill, being a revenue measure, is under consideration by the Ways and Means Committee of the House. It is not without the realm of possibility that munition manufacturers will be heard from in their defense of the inalienable "right" of the American citizen to bear arms, and voice objection to burdensome regulations upon obtaining them.

(10) S. 2460 is a bill designed to limit the operation of the Statute of Limitations in the case of defective indictments. As passed in the Senate, it provides that a new indictment may be returned at any time during the next succeeding term of court following a finding that the indictment is defective, during which succeeding term of court a Grand Jury shall be in session, even though such finding occurs after the expiration of the period prescribed by the Statute of Limitations.

(11) S. 2254, H. R. 6922, is designed to abolish the right of appeal where a writ of habeas corpus has been granted to test the validity of a warrant of removal, when the petitioner has been remanded to custody for removal on such warrant. There is no constitutional provision granting a right of appeal and the procedural delays frequently caused by unscrupulous counsel in such cases have become notorious.

(12) S. 2845, H. R. 6917, is a bill which would require that testimony to establish an alibi shall not be admitted in evidence in a federal criminal case unless notice of the intention of the defendant to claim such alibi shall have been served upon the Prosecuting Attorney at or before the time the defendant is arraigned, which notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. However, it further provides that the Court may, in its discretion, admit such testimony if good cause is shown why the required notice has not been served. This bill is similar to statutes recently passed in Ohio and Michigan, but it may well be that it will be considered too drastic for present enactment.

(13) S. 2256, H. R. 6921, would amend the Act of March 16, 1878, by omitting therefrom the words "and his (the accused) failure to make such request shall not create any presumption against him." The purpose of this omission is to allow comment upon the failure of the accused to testify insofar as such comment shall not constitute an infringement upon the constitutional privileges of the accused against self-incrimination. There have been numerous comments in this Journal concerning the advisability of such legislation. Since there is a conflict of authority as to the constitutionality thereof, it is thought advisable to refrain from an affirmative grant of the privilege, merely omitting the provision which has been held to prevent comment, thus allowing the Court to designate the constitutional limits of such comment. If this bill is passed it will probably contain an additional provision to the effect that "the failure of such person to testify shall not be the subject of comment by the trial court." This would leave open the question of comment by counsel for the State and for the accused.

(14) S. 2917, H. R. 7353 is a bill which would grant the consent of Congress to any two or more states to enter into compacts for cooperative effort and mutual assistance in the prevention of crime. This measure, which has received study by previous sessions of Congress, was evolved in the hope that it might relieve the pressure upon the Federal Government to extend its criminal jurisdiction. It merely removes a restraint upon the states imposed by the Constitution, which can be removed by the Congress. In this bill lies the principal hope of the exponents of states' rights to check the growing demand for an increase of Federal police power in the suppression of crime. Whether the states will take advantage of this power remains to be seen.

The enactment of this legislation undoubtedly would substantially increase the burden of law enforcement now resting upon Federal authorities. The personnel of the Division of Investigation would have to be enlarged to some extent. Certainly under the present administration a most earnest effort will be made to administer such laws in full cooperation with the State authorities. If these laws serve the required purpose it is to be expected that they will remain. On the contrary, if it be found that they require substantial revision in one manner or another such changes can be readily brought about by acts of Congress. At least the American people will have an opportunity to observe what, if any, advantage exists in a centralized and coordinated effort to put an end to the depredations of the roving criminal, a most unwelcome inhabitant in our country.

DEPARTMENT OF CURRENT LEGISLATION

Criminal Legislation of 1933

By Joseph P. Chamberlain

Procedure

THE regulation of bail in criminal cases in 1933 showed no fundamental trend. The most important legislation was that of Colorado[1] amending the former rule allowing the Supreme Court to admit to bail in criminal appeals except in capital cases. The new statute vests in the trial judge the right to admit any sum which he deems proper and allows bail as a matter of right where the defendant has been sentenced to fine only. In other cases bail is dependent upon the opinion of the trial judge that the ends of justice demand it. The Supreme Court no longer admits to bail during appeal but it is relegated to a supervisory position. It may review the order admitting to bail and, in cases where the judgment is not for a fine only, may cancel the order and remand the defendant to custody if convinced that the appeal is not being prosecuted in good faith and with due diligence. North Dakota[2] allows minors to bind themselves by undertakings to secure their own release on bail with like effect and in like manner as persons *sui juris*. The Texas[3] legislature expressed an idea which would be of value in a jurisdiction in which bail bonds are taken seriously. In the Lone Star State in the future the principal and sureties on a bond must pay the expenses incurred by peace officers in rearresting the principal. The enforcement provision appears in the requirement that a peace officer making the arrest must look only to the bondsmen for reimbursement of his expenses, the State will not be liable. Illinois[4] declares that no attorney practicing in the State shall be accepted as bail or surety in any criminal action or proceeding.

Several more States have come around to the view that the jury trial should be a privilege of the defendant and that it is not essential to the welfare of society that the guilt of the defendant should be determined by twelve persons of the vicinage. The people of Oregon[5] expressed their opinion by adopting an amendment to the Constitution permitting the accused in other than capital cases, with the consent of the trial judge, in writing, to waive trial by jury and elect a trial by judge alone. The New Hampshire legislature[6] agrees in retaining the jury in capital cases as a social right but permits any other defendant in a criminal trial in the superior court to waive, in writing, jury trial. This, however, he must do before the jury is impaneled, and if there is more than one defendant in the case, all must exercise the election. North Carolina[7] permits a defendant in the superior court to enter a conditional plea of guilty or, if the court will permit, *nolo contendere*. He can not do this in a capital case, and he must be represented by counsel so that the court may be certain that his rights are fully protected. The judge then hears the evidence and renders judgment if he is satisfied that the defendant is guilty, otherwise he orders the plea stricken out and a verdict of not guilty entered. The defendant has the same right to demur to the evidence and to appeal from the final judgment as he would have had in a jury case. The judge, on the other hand, may find the defendant guilty on any count or charge or degree of offense just as could have been done in a jury trial. Ohio[8] permits waiver where the offense is punishable by death but takes the heavy responsibility off a single judge by requiring three to sit. A majority decides all questions of fact and law at the trial and renders judgment. If the accused pleads guilty of murder in the first degree, the statute nevertheless requires that the judges examine the witnesses, determine the degree of crime and pronounce sentence accordingly. They may not sentence on the plea alone. The court also may extend mercy and reduce punishment to life imprisonment the same way a judge could have done on recommendation of a jury.

The regulation of the indictment came up in an interesting way in Arkansas.[9] Except in capital offenses the defendant in felony prosecutions may in open court, in writing, expressly waive prosecutions by indictment or presentment and consent to the filing of an information. Before waiving, the court must inform accused of his right to counsel and may accept the waiver only after accused has consulted counsel or waived this right. The defendant is also guarded by the requirement that the waiver shall not be allowed if the accused has had a preliminary examination before a tribunal resulting in his discharge. Oregon[10] permits the joinder in one indictment in separate counts of several charges against any person or persons for the same act, and if two or more indictments are found in such case the judge may order them to be consolidated. Maryland[11] permits the filing of a criminal information if the defendant charged with a misdemeanor desires to plead guilty. No grand jury indictment is needed in such case.

There are two noteworthy decisions of the legislatures in respect to venue. Ohio[12] deals with the difficult question of offenses committed in, from or against any aircraft during flight and decides that the trial may be had in the county in which

1. Ch. 63. All acts cited are from 1933 Session Laws unless otherwise indicated.
2. Ch. 214.
3. Ch. 82.
4. P. 466.
5. P. 5.
6. Ch. 96.
7. Ch. 469.
8. P. 530.
9. Ch. 122.
10. Ch. 40.
11. Ch. 562.
12. P. 521.

the offense was committed, if that can be proved, otherwise in any county over which the plane passed. If, therefore, a trial is begun in any county of the State on the allegation that the craft passed over that county, the defendant could demand a change of venue to the county in which the offense was committed, but he would, of course, have to prove that the offense was committed in the county specified, and so might be barred from subsequently trying to get a change to a third county on the allegation that he had been mistaken the first time.

South Dakota[13] comes to the help of the District Attorney. Formerly the defendant could move for removal of a criminal action to another county on evidence that he could not have a fair trial, or for a change of the judge of a circuit court, on the ground that he was not impartial. Henceforth either party, the State or the defendant, may request a change of the judge because of the bias of the presiding judge of the Circuit Court. The presiding judge of the Supreme Court designates another Circuit judge; either party is entitled to but one change of judge. The defendant alone retains the right to request removal to another county. Illinois[14] takes a different step towards putting the District Attorney on a par with the defendant's counsel. Formerly the people had no appeal in criminal actions. The new statute allows the people to sue out writs of error to review any order or judgment quashing or setting aside an indictment or information. The defendant, however, can not be held in jail or held to bail during pendency of such a writ of error.

Colorado[15] amends its law providing the manner of inflicting the death penalty, to change the method from hanging to the administration of lethal gas.

In addition to several of the States which have adopted the Uniform Extradition Act,[17] Pennsylvania[18] authorizes the Governor to extradite any person imprisoned in a Pennsylvania institution for less than life to any State in which he is charged with murder. Prior to his removal, however, the demanding State must agree that he shall be returned to Pennsylvania to serve the balance of his sentence if he is acquitted in the demanding State, or convicted of a crime punishable by less than death or life imprisonment.

The legislatures are continuing their experimentation in the right way to try criminals who are insane or otherwise mentally unsound. Pennsylvania[19] allows the trial judge in case of conviction, on his own initiative or on application of the District Attorney or counsel or other person acting for the defendant, to defer sentence until the report of a mental examination is made. The judge may require the report to be made by a psychiatrist of the Department of Public Welfare or state or county mental hospital. The report must be available to the counsel for defendant and the District Attorney. If the report shows that the defendant should be committeed to an institution other than a prison the trial judge may so commit him until further order, and in such case shall make an order on the defendant, or on persons responsible for his support, or if there be no such person, on the county or Commonwealth, for the costs of his admission, care and discharge. Alabama[20] also gives weight to the opinion of specialists. Where the judge has a report of not less than three specialists in mental and nervous diseases whom he has appointed, or a report of the Superintendent of State hospitals for the insane, that there is reasonable ground to believe that a defendant indicted for a capital offense was insane at the time of the commission of the offense, or is presently insane, the judge shall order the defendant to be delivered by the sheriff to said superintendent, who must put the defendant under observation and examination of himself and two members of his medical staff, to be named by him, constituting a commission on lunacy, to determine defendant's mental condition and the existence of any mental disease or defect which would affect his criminal responsibility presently or at the time of the commission of the crime. As soon as the commission reaches a conclusion it must make a written report to the clerk of the court which must be accessible to the court and to the counsel for the people and for the defendant. The clerk then must order the sheriff to return the defendant to prison and the criminal proceedings will be resumed.

Wisconsin[21] takes care of the situation where an accused person who was committed for insanity is not so far recovered as to be returned to the court to stand trial but who, the superintendent thinks, may be paroled under supervision. The superintendent in such case must give notice to the court which made the order of commitment, and if no objection is filed within 60 days, he may parole the person in the custody of a relative or guardian, subject to be returned at any time to the institution on direction of the superintendent or the State Board of Control. If the court objects to the parole, it must file written objections with the superintendent who may refer them to the Board of Control which, after full investigation, may order parole notwithstanding the court's objections.

Ohio[22] makes a move to compel prompt action in criminal proceedings by providing that a postponement of examination of accused before a court for more than 10 days, shall have the legal effect of dismissal for want of prosecution but shall not be a bar to future proceedings on the same charge.

New Mexico[23] prohibits an attorney who is father, son or brother of a district attorney from defending any person charged with crime which the district attorney must prosecute.

Detection and Prosecution

The detection and prosecution of crime is being recognized as less a local matter and as more a state concern. Steps have even been made toward a national treatment of certain phases of the subject. One of the bills which the Attorney-General has submitted to the Chairman of the Judiciary Committees of the House and Senate deals with the baffling problem of witnesses in felony cases going to other states to avoid giving testimony. Another,

13. Ch. 84.
14. P. 465.
15. Ch. 61.
17. Vermont, No. 36, Wisconsin, ch. 40.
18. No. 87.
19. No. 78.
20. No. 157, Spec. Sess. 1933.
21. Ch. 264.
22. P. 530.
23. Ch. 172.

extending the scope of the national Motor Vehicle Theft Act to include other stolen property in interstate commerce, finds one of its justifications in the difficulty in getting evidence in cases of interstate crime.[24] The interesting combination of local, state and national criminal identifications bureau got a setback in Arkansas,[25] which repealed the act creating the state bureau. North Dakota[26] decided that the warden of the State penitentiary could take on more work, so it gave him the job of superintendent of the bureau of criminal identification, at the same time cutting the salary of the superintendent from the State budget. Another field of crime detection in which a development of interstate and perhaps national, and even international, cooperation is almost certain to develop, is that of radio detection through the installation of receiving sets in police stations and motor vehicles. Kansas[27] authorizes specific counties and cities to equip their police and their sheriffs with such sets and to make contracts with broadcasting stations for the transmission of instructions. Alabama[28] is so convinced of the value of this means of finding crime that the legislature authorizes specific counties to set up radio broadcasting stations of their own for the purpose. Indiana[29] makes a move to prevent a runaway criminal from sharing in the information broadcast to the police, by making it unlawful to have in any motor vehicle a receiving set which will receive frequencies assigned for police purposes.

A different form of state action to aid in the catching of lawbreakers is Vermont No. 8, in which the legislature records its satisfaction with a statute authorizing the Governor to offer a reward for the capture of any person who has escaped from an institution, by extending his power so that he may, on the request of the Attorney-General, offer a reward for information leading to the arrest and conviction of any felon. New Hampshire[30] also recognizes the state's responsibility by permitting the Attorney-General, with the Governor's approval, to employ an investigator to help in catching criminals. The investigator has the powers of a constable all over the state, and may serve process and make arrests in any county. The legislature authorizes the Attorney-General also to get hold of all information concerning persons who commit felonies, or are habitual criminals, or have been arrested in the state, thereby setting up a criminal identification bureau which may be open to local as well as state law enforcement officers. Indiana[31] sets up a state police under the direction of the department of safety, specially to enforce automobile and highway laws but with the broader duty of preventing and detecting crime and apprehending criminals. Respect for home rule is evidenced in the requirement that state police shall not act within the limits of a city in labor disputes or "to suppress rioting and disorder except by direction of the Governor" or on request of the Mayor with the Governor's approval, and for the neutral attitude of the public authority in disputes between labor and capital, by requiring that before they act in respect to any labor dispute outside a city, the governor must give direction to do so, or the judge of the circuit court may request them to act, with the governor's approval.

What looks like a device to make it easier for the police to pick up gangsters on suspicion is contained in an Illinois statute,[32] which adds to the class of vagabonds and terms "habitual violators of criminal laws, persons who carry concealed weapons." It is more interesting that the group is intended to include persons who habitually carry weapons about their persons or in motor vehicles or other conveyances and "all persons who are reputed to act as associates, companions or bodyguards of such persons reputed as aforesaid to be such habitual violators of the criminal laws of this State or of the United States." Apparently then, any member of a gang could be picked up at any time by the police either as one who habitually carried deadly weapons or, at the very least, as one who is an associate or companion of such a person. The expression would go far beyond gangs and could include any woman companion, or a fence who associates himself with the members of a gang for the disposing of their stolen property. Even if no other offense could be proved against him, the person arrested would be liable to punishment because of his bad associations. Another Illinois Statute[32a] looks like a new means of discouraging the use of concealed weapons. It also looks like a very convenient tool in the hand of the police in the war on armed bands of gangsters. The act permits the issue of a search warrant on an affidavit stating that "any drunken, idle dissolute, convicted criminal or reputed criminal person, naming him according to any name or names by which he is commonly known, is carrying concealed on or about his person or in an automobile or other vehicle, a pistol, revolver or other firearm, and is not a person authorized by law to carry such pistol, revolver or other firearm." If the weapon be found on the person he can, of course, be arrested for carrying concealed weapons.

Prisons and Prisoners

The coming into effect of the Hawes-Cooper Act[33] is foreshadowed in a number of states which have passed laws regulating the sale of prison-made goods, many of which prohibit the sale of prison goods whether made within or out of and brought into the state.[34] North Carolina[35] and Florida[36] take a halting step in the same direction. North Carolina excepts agricultural products, stone and coal, which may be sold in the general market, and Florida permits the use of convicts to grow sugar cane which may be sold, and authorizes contract prison labor by permitting the board to contract with a private person, or corporation, for the use of convicts for the growing of sugar cane, the net profits to be paid into the state prison fund. Other states[37] limit the new legislation to subjecting convict-made goods brought into the state to the state law on the same basis with goods made in their prisons. Iowa[38] goes back to an old idea and re-

24. New York Times, Feb. 20, 1934.
25. Ch. 145.
26. Ch. 102.
27. Ch. 178.
28. Ch. 171.
29. Ch. 66.
30. Ch. 152.
31. Ch. 71.
32. P. 489.
32a. P. 482.
33. 45 Stat. 1084, Jan. 19, 1929, effective Jan. 19, 1934.
34. New Hampshire, ch. 49; Montana, ch. 172; Utah, ch. 69; Arizona, ch. 103; Idaho, ch. 216, and California, ch. 636.
35. Ch. 146.
36. Ch. 16182.
37. Ohio, p. 72; Arkansas, No. 253; South Dakota, ch. 158.
38. Ch. 50.

quires prison-made goods brought from other states to be distinctly marked before exposure for sale.

North Carolina[39] sets up its prison administration with the object of providing gainful occupation for prisoners and makes it very clear that it has roads principally in mind by consolidating the state highway commission and the prison department into a state highway and public works commission. No monopoly of convict labor on roads is intended, however, since the act authorizes the commission to provide labor for other state agencies. Carrying out the purpose of the act, convicted felons are sent to the central prison and may be assigned to labor under the supervision of the commission, while misdemeanants in county jails are also assigned to work under the commission if their sentences are 30 days or more. The commission is authorized to establish necessary labor camps to which convicts shall be assigned. Prison discipline will be made easier by allowing rewards for good conduct under the provision directing the commission to grade convicts according to their conduct and to provide inducements for higher grades. The principal inducement, commutation of sentence, must not exceed that allowed by law. Further reward for good conduct is contained in a section which allows the judge to sentence for an indeterminate period of over twelve months, in which case the commission may consider the conduct of the prisoner every six months and authorize discharge after service of the minimum term for the crime for which he was convicted. The board consists of a chairman and six members with interlocking terms. They are all appointed by the Governor and may be removed for cause. The chairman receives a salary of $5,000 and the other commissioners a per diem. An interesting section requires that a child born of a female convict shall on arrival at a suitable age, be surrendered to the clerk of the Superior Court for disposition as the law provides for the children of parents who are dead or unable to provide for them.

California[40] uses the privilege of parole as a means of punishment of prisoners who escape or try to escape. These persons may not be paroled until after serving at least two calendar years from the date of their return from prison. Indiana[41] takes thought not alone of the wish of the prisoner and the preservation of prison discipline but also of the effect on society of enlargement of convicts and their own welfare, in setting up a parole system. An unpaid parole commission supervises the probation system and makes rules for its administration. The commission is placed between the probation officers and the political power by the not uncommon device of permitting the commission to appoint a director who in his turn appoints the officers who must be selected after competitive examinations prescribed by the commission.

North Dakota[42] appears to be aiming at cutting the cost of funerals as well as providing employment for prisoners, by authorizing the manufacture of coffins in the state penitentiary. The coffins may be sold at not over 10%, if at wholesale, or 20% if at retail, more than the cost of manufacture. County commissioners must use these coffins for burial of paupers and may sell them to the general public, but the act permits sale to the general public as well at wholesale or retail. West Virginia,[43] Texas,[44] New Mexico,[45] and North Dakota[46] provide labor for convicts by requiring that automobile license plates be made by them. Oklahoma[47] allows the working of county jail prisoners on public highways but gives a credit of 2 days for each day's work, and helps the sheriff keep order by giving 5 days credit for every 4 days of obedience to the rules and regulations. Indiana[48] contains a table of allowance from sentence for prisoners who obey the rules and faithfully perform their duties, and it utilizes the disciplinary value of the system to the utmost by allowing the superintendent to reduce, for violation of prison rules, good time gained, and for a sufficient cause to restore the time forfeited. California[49] extends her act prohibiting cruel punishment in prisons to any state, county or city institution, including state hospitals for the insane. The Golden State lawmakers widen the act to forbid any treatment or lack of care which would injure or impair the health of the person confined.

Suspension of sentence and probation are authorized by North Dakota[50] and Minnesota.[51] The Oklahoma legislature[52] believes that sterilization is a proper means of preventing the propagation of the unfit, for it amends its act permitting sterilization of the insane to include habitual criminals, who are defined as persons who have been three times convicted of felony.

Miscellaneous

California[53] creates the public offense of lynching which is defined as "the taking by means of a riot of any person from the lawful custody of any peace officer," and makes the felony punishable by not more than twenty years imprisonment. A riot in California may be carried out by two or more persons acting together. The same State[54] contributes an idea for the safety of the highways by making it a misdemeanor to shoot any firearm from or on a public road. Pennsylvania[55] and Maine[56] deal with fraud on relief funds. Maine is concerned with evidence of such frauds and requires banks and other financial organizations to inform the welfare authorities, at their request, of the amount deposited to the credit of any person who is receiving support or has applied for it. Pennsylvania sets up a new crime by making it unlawful to furnish anything other than food on a relief food order, or to furnish food on such order to any other than the original recipient thereof. Nevada[57] deals with another social field, prohibiting the addition of more than the actual tax, state or federal, on any article on which there is a sales tax, and terms the offense profiteering.

New Mexico[58] abrogates the distinction between an accessory before the fact and a principal, and between principals in the first and second degree in felony cases. All persons concerned in the commission of felony, whether they directly commit the offense, or aid and abet in its commission, though not present, must be tried as principals and no additional facts need be alleged in any indictment or information against such accessory than are required against the principal. The accessory may be tried and punished though the principal be neither prosecuted nor tried, or may have been acquitted.

39. Ch. 172.
40. Ch. 814.
41. Ch. 360.
42. Ch. 242.
43. Ch. 4. 44. Ch. 187. 45. Ch. 5. 46. Ch. 243. 47. Ch. 123. 48. Ch. 164. 49. Ch. 919. 50. Ch. 106. 51. Ch. 135. 52. Ch. 46. 53. Ch. 401. 54. Ch. 203. 55. Ch. 89. 56. Ch. 119. 57. Ch. 175. 58. Ch. 105.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE Civil Practice Act of Illinois. Adopted June 23, 1933. Effective January 1, 1934. Laws, 1933, pp. 784-836. Cahill's Rev. Stat. 1933, Chap. 110. Published by the Chicago Bar Association, November, 1933. Supplementary Rules published in the Illinois Bar Journal, January, 1934. Annotated edition prepared under the direction of the Illinois State Bar Association by O. L. McCaskill, A. E. Jenner and W. V. Schaefer, published by The Foundation Press, Chicago, 1933.

It is perhaps unusual for a department of current legal literature to concern itself with that form of literary product found in contemporary legislation, and the reader does not ordinarily expect to find statutes included "among recent books."

The actual authorship of a statute is seldom known outside the group of its legislative sponsors. Before its passage the important question is not, who wrote it, but who supports it. After its adoption the state stands *in loco parentis*, and its origin and individuality are lost in the anonymity of a serial number which is assigned to each act for purposes of identification.

But sometimes a statute represents more than the legislative authority of the state. Its significance may be due as much to its origin, its background, its purpose and its authorship as to the mere language of its provisions. And when this is the case, it may not be inappropriate to consider it as the work of those who actually planned it, assumed responsibility for its form and substance, and offered it to the state as a literary product of the lawyer's art.

From this point of view the new Illinois Civil Practice Act presents many features of interest, to which the reviewer has been asked to direct the reader's attention.

In the year 1929 the courts of Illinois were in a position essentially the same as that occupied by the courts of New York three-quarters of a century ago. At that time the administration of justice in New York had become intolerable. Two different and mutually exclusive systems of remedial law were competing with each other for popular disfavor. Cases at common law and cases in equity stubbornly pursued their separate ways, each encumbered with a peculiar, elaborate and dilatory technique which had undergone no substantial improvement for three hundred years.

As early as 1839 David Dudley Field had addressed a letter to Senator Verplanck upon this subject, in which he said: "The judicial system which prevails in this State has come now to be so inefficient for good, and so productive for evil, that some remedy is indispensable. . . It is now several years since reform of our system came to be considered a matter of most urgent necessity. . . An inquiry was ordered by the Senate, . . and the matter was referred to the Chancellor and the judges. . . It was not to be expected that they should report any vice inherent in a system in which they were the chief officers. They recommended some changes in details. . . The subject has been often debated, and the inquiry repeated. . . But all these debates and inquiries have ended in nothing. . . Such a condition of things is disreputable and oppressive. . . One of the greatest, if not the very greatest, of the duties of government is the administration of justice. The regulation of commerce, the making of public works, the fostering of industry, the development of internal resources, are as nothing compared with the determination of right between man and man. Indeed, sir, the evil can be endured no longer. . ."[1]

The opinions of Mr. Field were strongly shared by the public. His own services were enlisted in the cause of reform, and in the year 1848 a code of civil procedure, designed and drafted by him, was adopted by the legislature of New York, consolidating law and equity in a single simplified system. In the boldness of its innovations it made no concessions to professional timidity and conservatism. Its provisions were sought to be justified on no other grounds than their inherent soundness, without regard to how far they departed from familiar practices. It marked the first complete break, in the English speaking world, with the ancient technique of the English judicial system.

From that day the prestige of classical common law and equity procedure rapidly crumbled. Within five years seven states had adopted the New York code. By 1870 it had been placed on the statute books of twenty-three states. In 1873 England abolished the system which had so long impeded the administration of justice, and adopted a procedure which went even farther than the New York code. The English speaking colonies of the British Empire followed suit. The reform spread to most of the remaining states of the American Union, some of which adopted the New York code while others set about remodeling their existing systems with a view to eliminating their abuses and supplementing their defects.[2]

But there were a few states where the spirit of reform found little or no response. At the head of the list stood the state of Illinois. The second com-

1. Speeches pp. 220-223.
2. See Hepburn, The Development of Code Pleading.

mercial city of the western hemisphere found itself engaged in a struggle to meet twentieth century conditions with the judicial machinery of the reign of Queen Elizabeth.

Every defect in judicial procedure which Field sought to remedy by the New York code of 1848, every reason for the wave of procedural reform which spread over the United States two generations ago, every ground upon which England abandoned her system of procedure in 1873, by the greatest judicial revolution in her history, was still to be found, unaltered, in the judicial system of Illinois in the year 1929.

In the face of such a situation the Chicago Bar Association, in that year, undertook to modernize the practice of Illinois, as David Dudley Field and his collaborators had modernized that of New York seventy years before. The problems had become more intricate with the passing years, but at the same time the added experience of two generations had vastly enlarged the information which was available regarding the operation of procedural machinery. Not only had the New York code itself been thoroughly tested by long and severe use under infinitely varied conditions, but the new English system had demonstrated how far its provisions were successfully meeting modern needs. And in addition, many states had experimented with special devices of various types which threw a great deal of light upon practicable possibilities of reform.

The task was assigned to a committee, consisting of Harry N. Gottlieb, chairman, Isaac S. Rothschild, William H. Holly, Chester A. Legg, and Floyd S. Thompson, with Charles O. Loucks, chairman of the committee on Judiciary, as an active member ex officio.[3] All were engaged in active practice. An adequate survey of the history and present status of procedure throughout the United States and the British Empire, and the drafting of an act which would give to Illinois the best features of other systems while preserving the best in her own, called for the expenditure of more time than the members of the committee had at their personal disposal.

But the larger problems of modern social organization have fortunately been counterbalanced by the development of better facilities for dealing with them. Among these agencies in the legal field, was the research endowment of the University of Michigan, given by an eminent lawyer of New York, the late William W. Cook. He had been profoundly convinced that the legal profession was faced with grave and growing responsibilities for the preservation of social and political institutions, and that only through organized scientific study of the legal system could this responsibility be carried. The research foundation which he established, and to which he contributed his fortune of many millions, was designed to be a nation-wide agency for such study, available to the public and the profession wherever its aid could be of value.

It was to the legal research institute of the University of Michigan that the Chicago committee presented its problem, and the present reviewer, as professor of legal research, undertook to contribute his services as investigator and draftsman in the preparation of the new practice act.

David Dudley Field, in attacking the problem of reform in New York, had observed that there were two ways of answering the questions as to whether, and in what respect, changes should be made,—"one, by referring to the experience of other states; the other, by examining step by step the proceedings in a cause, according to our present practice, considering their necessity, and comparing the whole with a natural system."[4]

Both of these methods were employed by the Chicago Bar Association committee. Every provision found in the Illinois Statutes regulating law or equity practice, was appraised on the basis of its inherent usefulness and convenience, and was retained or discarded in accordance with the appraisal. The principles of procedure adopted or developed by the decisions of the Illinois courts were subjected to similar tests. In this way it was determined how far the existing system, both in its general outline and in its details, measured up to the present needs of a populous industrial and commercial state. To that extent it was retained.

To supply the place of those features of the system which did not meet the test of usefulness and convenience, and to provide needed machinery for wholly new purposes, recourse was had to the wealth of experience throughout the English speaking world with various methods of dealing with the problems of judicial procedure.

The final result was not the abolition of the entire system of procedure with which the profession in Illinois was familiar, but a composite, which preserved all that was considered good in the old, replaced with something better everything which was discarded as useless and inconvenient, and added such new devices as had been shown by the experience of other jurisdictions to be worthy of a place in a modern procedural system.

The chief complaints against the administration of justice were its delays, its expense and its uncertainty. The committee's problem was to work out a system of procedure which would diminish or avoid these grounds of criticism. How well it succeeded in doing so may be roughly determined by applying the following tests to the provisions of the new Civil Practice Act:

1. How far did it bring about an increase in operating speed?

2. To what extent did it avoid lost motion by eliminating unessential requirements, steps or proceedings?

3. To what extent did its simplification of rules reduce the possibilities of making mistakes and the opportunities for raising objections?

4. How far did it compel each party to give the other full information at every stage of the proceedings, so that neither would be able to operate behind a smoke screen?

5. Did it succeed in making procedure more elastic and efficient by giving the Supreme Court a suitable measure of control by means of rules of court?

1. Higher Operating Speed

Generally speaking, the time limits fixed for the taking of particular steps in judicial proceed-

3. Illinois Civil Practice Act, Annotated, Introduction.

4. From a letter to John L. O'Sullivan, member of the New York Assembly, dated January 1, 1842, in Vol. 1, Speeches, p. 226.

ings are not major causes of delay. It is the unnecessary extension of those time limits by the court upon request of counsel, largely through orders for continuance, which causes trouble. No rules can meet this difficulty. It is due to the inability of lawyers and judges to withstand pressure for delay. The antidote is better and more independent judges, and lawyers with a higher sense of public responsibility.

Still, a few time intervals were reduced. That between the issuance of the summons and the filing of the complaint in law actions was eliminated (Rule 3); twenty day intervals between successive steps were substituted for discretionary orders of the court (Rule 8); return days were fixed at intervals of two weeks instead of once each term (Rule 1); and where defenses both in abatement and in bar were to be employed, the rule was abolished which required the former to be pleaded and disposed of before the latter could be pleaded. (Sec. 43 (3)).

2. Elimination of Useless Steps and Proceedings

Legal procedure has always been formal, and formality always tends to amplify unnecessary requirements and to multiply useless steps and proceedings. Extensive improvements were made in this direction by the Civil Practice Act.

The praecipe for a summons was abolished as serving no useful purpose (Sec. 5); the requirement of an attempt to serve process upon the president of a corporation before making service upon any other officer or agent was eliminated (Sec. 17); the gesture of filing a mere notice of appearance, which did nothing to advance the progress of the cause, was abolished (Sec. 20); profert and oyer were discarded (Sec. 36); bills of particulars were made demandable as of right, without necessitating the time and expense of an application and order (Sec. 37); separate actions were made unnecessary in a large number of cases by liberal rules as to joinder of actions and parties and the use of counterclaims (Secs. 4, 23, 24, 44); trials were dispensed with in certain cases by authorizing motions to dismiss supported by affidavits (Sec. 48); fictitious issues were sought to be eliminated by imposing a penalty for untrue allegations and denials (Sec. 41) and by authorizing discovery before trial (Sec. 58) and summary judgments upon affidavits (Sec. 57); demands for admissions were authorized as a substitute for the use of proof (Sec. 58, Rule 18); and the avoidance of new trials in many cases was made possible by authorizing a judgment notwithstanding the verdict based on the evidence (Sec. 68; Rule 22).

3. Elimination of Opportunities for Making Mistakes and Raising Objections

Litigation over the meaning and application of rules of procedure has been the bane of our system of administering justice. It is one of the chief causes for all three of the major criticisms made against the courts,—delay, expense and uncertainty. Every rule, and every restrictive or qualifying word and phrase in it, offers a possibility for procedural errors by one party and for procedural objections by the other party. A complex system of rules is a veritable Pandora's Box of possible procedural troubles.

This was a danger to which David Dudley Field gave too little attention. But the history of the New York code, both in its native state and in the many jurisdictions where it has been adopted, shows that the practical value of procedural restrictions and qualifications may be enormously outweighed by the opportunities they unfortunately offer for raising technical questions of construction and application, which may seriously delay or wholly prevent the decision of cases upon their merits.

In preparing the Civil Practice Act this source of danger was carefully watched, and the effort was made to eliminate every limitation, restriction and distinction which did not seem to be essential. The result was a striking departure from the type of procedural regulation in common use in this country, and the adoption of a number of rules very similar to those employed in England.

The portions of the field in which these considerations played the most important part were those dealing with parties and pleading.

Proper parties, plaintiff and defendant, and their proper joinder, have always been a fruitful source of litigation. Mr. Dicey found it necessary to devote 532 pages, in his classic work on Parties to Actions, to a treatment of the common law rules, which he reduced to an analytical schedule of 118 Rules, 18 Subordinate Rules, and 95 Exceptions. Calvert on Parties to Suits in Equity was a book of 318 pages. The "codes" undertook to formulate new rules for parties under the fusion of law and equity, specifying that a new sort of party called the "real party in interest" should, subject to certain exceptions, always be the plaintiff, and that all persons having an interest in the "subject of the action" and in the relief demanded might join as plaintiffs, that anyone having an interest adverse to the plaintiff might be made a defendant, and that all persons "united in interest" must be joined. These provisions have probably produced an even larger volume of useless litigation than the old rules of the common law and chancery which they were designed to supplant.

To eliminate the possibility of these innumerable controversies, an almost unrestricted and unlimited joinder was authorized, of all parties who had any connection with the controversy, whether they were involved jointly, severally or in the alternative. If too many parties were joined they were merely to be dropped, and if not enough parties were joined they could be added, at any time, by order of the court. (Secs. 23, 24, 25, 26). This practically removed the hazards involved in the doctrine of parties by making it impossible to commit a mistake not subject to immediate correction. and making it hardly worth while to go to the trouble of raising technical questions. Inconveniences which might otherwise result from complicated joinders could always be avoided by discretionary orders of the court for separation of issues for trial.

Pleading was the other chief source of useless litigation over technical questions of procedure. Such litigation has caused much delay and great expense, and has always cluttered the calendars of both trial and appellate courts.

Experience indicates that the main reason for most of the unnecessary litigation over the form and substance of pleadings, has been due to the

employment of technical tests of sufficiency, under which plausible arguments can be advanced in support of innumerable objections having no relation to the practical operation of the system. To avoid this source of trouble, the Illinois Civil Practice Act introduced a new test of substantial sufficiency, namely, whether the pleading reasonably informed the opposite party of the nature of the cause of action or defense which he was called upon to meet (Sec. 42 (2)). Bills of pariculars had long been used as a means of escape from the technical tests applied to the pleadings, and the ease and convenience which always attended their use was due in large part to the test of sufficiency applied to them. They were deemed to be good so far as they reasonably gave information. This test, by the terms of the Civil Practice Act, was transferred to the pleadings, and if Illinois is to have an experience like that of Michigan with the same rule, the amount of litigation over the sufficiency of pleadings will be enormously reduced.

Joinder of actions and the use of counterclaims was another department of pleading which at common law, in chancery and under the "codes," had been "safeguarded" with so many refinements, limitations and distinctions, most of them purely technical, that the practice had become highly artificial and subject to much useless contention.

The new Civil Practice Act undertook to solve the difficulty by cutting the Gordian knot. The whole subject was removed from the field of contentious litigation by permitting all actions of every kind to be joined, and by authorizing all cross claims of every type to be employed at will, without any restriction or limitation (Sec. 44). No inconvenience can result from this in the pleadings, and if separate trials of some of the issues ought to be had they may be ordered by the court (Sec. 44).

Two other features of the new Civil Practice Act properly fall under this head.

Errors in instructions to juries are guarded against by a provision that proposed instructions to the jury shall be submitted to the parties by the judge before they are given, in order to afford an opportunity for making criticisms and suggestions. (Sec. 67). And the danger of nullifying proceedings for review by the commission of "jurisdictional" errors is removed by a provision that after the notice of appeal has been filed, no step shall be deemed to be jurisdictional. This will permit the proceedings to be corrected in proper cases where mistakes are made. (Sec. 76 (2)).

4. Prevention of "Ambush Warfare" in Litigation

Failure to provide the parties with adequate information for the preparation of their cases was the outstanding failure of the common law and equity systems of procedure, and the "code" did little to supply a remedy.

It was possible for the plaintiff to employ such fictitious formulas as the common counts; the defendant was permitted to use a general demurrer and a general denial or general issue, none of which disclosed anything as to his real position; either party was practically free to assert any fact, irrespective of his ability to prove it, or even of a bona fide intention to attempt to prove it, and denials could be made with a similar disregard of the truth. The interrogating parts of bills in equity, and bills for discovery, were almost worthless, there was no method in legal actions for getting information regarding the evidence of one's opponent prior to the trial, and documents could be concealed until forced out at the trial by a *subpoena duces tecum*.

Various means were adopted in the Illinois Civil Practice Act to remove these serious defects in the procedural system.

Allegations in pleadings were required to be concrete, (Sec. 33), and denials were to be specific and not evasive (Sec. 40). Every matter of defense was required to be affirmatively pleaded, even though it might amount to an argumentative denial, where it would be likely to take the other party by surprise if not expressly stated (Sec. 43 (4)). Parties who made untrue allegations or denials without reasonable cause and not in good faith, were subject to be penalized by being required to reimburse their opponents for expenses incurred by reason of such untrue pleading (Sec. 41). Bills of particulars were made demandable as of right (Sec. 37). Where a defendant really disputed nothing but the amount of the damages he was permitted to take issue upon it frankly, instead of being compelled either to raise false issues as to liability or suffer a default. (Sec. 40 (4)). And when a party's position was really an alternative one, he was permitted to say so honestly, instead of resorting to the fiction of two inconsistent counts or defenses, each asserted absolutely and independently. (Sec. 43 (2)).

To enable each party to obtain full information before trial as to the evidence of his opponent, the broadest provision has been made. Either party may, without any order of the court, take the deposition of any other party or any witness, regarding any matters in controversy. (Sec. 58 (2), Rule 19). Any party may make request in writing for the admission by any other party of any specific fact, or of the genuineness of any document, and if such admission is unreasonably refused, the party refusing will be compelled to make reimbursement for the expense of proof. (Sec. 58 (2), Rule 18). Sworn lists of relevant documents may be obtained from any party, and if they are in his possession such documents may be inspected, or any party may apply for an order against any other party at any time to show cause why he should not produce for inspection any designated document. (Sec. 28 (2), Rule 17).

5. Introduction of More Elasticity by Grant of Rule-Making Power

The use of the rule-making power by courts is not a general panacea for procedural difficulties. No court has ever exercised it with the skill, diligence and public spirit hoped for by the advocates of that method of regulating procedure.

On the other hand, legislative codes are unsatisfactory because of excessive rigidity.

The legislature, as the representative of the long-suffering public, is more likely to be willing to undertake substantial changes, to introduce fundamentally new principles, and to abandon practices which, owing to their familiarity, do not seem highly objectionable to the judges. But the technical details of procedure cannot be fully understood by a lay assembly, and technical ma-

chinery devised and created by legislative action is likely to be crude and impracticable.

If, then, the broader principles can be laid down by the legislature, and the operating details can be supplied by the court, each will be able to make that form of contribution for which it is best fitted.

It was this theory which was followed in the Illinois Civil Practice Act. The 94 sections of the statute regulate matters of jurisdiction and contain all the more fundamental, general and stable principles of procedure, while the 71 rules, as finally adopted by the Supreme Court, supplement the statute with details of a technical or formal nature and with such ancillary provisions as ought to be subject to alteration from time to time in accordance with the operating needs of the system.

It is obvious that the grant of power made by the act was tentative and experimental. Whether it will be enlarged or restricted will probably depend upon the degree to which the profession is able to develop a sustained interest in maintaining the rules upon a high level of operating efficiency.

* * *

In the preparation of the Civil Practice Act essentially the same methods were employed as those used by the American Law Institute in the preparation of its Model Code of Criminal Procedure. The committee met frequently, over a period of three years, to discuss the various drafts which came before it, one after another, as the work progressed. The membership was enlarged, to bring in a wider range of views. The State Bar Association actively cooperated. The professors of procedure of three great law schools of the state, Northwestern University, the University of Chicago and the University of Illinois, took an important part in the debates. The completed draft, as tentatively approved by the committee, was published by the Committee on Judicial Administration of the State Bar Association, and distributed to the entire bar of Illinois, for discussion and criticism. The suggestions which resulted from a year's study and discussion of the draft by the local bar associations of the state, were assembled and considered, and a final draft was then made and presented to the legislature.

The entire plan was conceived and carried out by lawyers. It was a voluntary contribution by the profession to the well being of the public. As such it stands in sharp contrast to the English Judicature Acts of 1873 and 1875, which were forced upon the legal profession by an outraged public which had spent two generations in an intensive struggle for a better administration of justice.[5]

EDSON R. SUNDERLAND.
Law School, University of Michigan.

5. See Hundred Years' War for Legal Reform in England, by Edson R. Sunderland, the Chicago Sunday Tribune, June 11 to August 15, 1926; reprinted in 12 Mass. Law Quar. No. 1 (Nov. 1926) and in the "Consensus" of the National Economic League, Vol. 15, No. 3 (Mar. 1931). Much of this material originally appeared in The English Struggle for Procedural Reform, by Edson R. Sunderland, 39 Harv. Law Rev. (April, 1926).

Leading Articles in Current Legal Periodicals

Harvard Law Review, March (Cambridge, Mass.)—Registered Bonds and Negotiability, by Roscoe T. Steffen and Henry E. Russell; Some Thoughts on the Doctrine of Recognition in International Law, by John Fischer Williams; A Case for Three Judges, by Joseph C. Hutcheson, Jr.

Harvard Law Review, April (Cambridge, Mass.)—Trial by Combat and the New Deal, by Thurman W. Arnold; Powers of Sale in Trustees and the Rule Against Perpetuities, by W. Barton Beach; Some Recent Subrogation Problems in the Law of Suretyship and Insurance, by Stephen I. Langmaid.

Michigan Law Review, March (Ann Arbor, Mich.)—The Evolution and Devolution of Public Utility Law, by Edwin C. Goddard; The Securities Act of 1933, by Laylin K. James.

Iowa Law Review, March (Iowa City)—Non-"Judicial" Functions of the District Court in Iowa, by Charles B. Nutting; Rationale of Past Consideration and Moral Consideration, by Hugh Evander Willis; Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships—I, by Stanley L. Sabel; The Transaction of Business within a State by a Non-Resident as a Foundation for Jurisdiction, by F. Arnold Daum.

Illinois Law Review, April (Chicago, Ill.)—The Illinois Business Corporation Law, by Charles G. Little; Code and Digest, by Albert Kocourek; Damages in Actions for Fraud and Deceit, by Charles T. McCormick; The Family Trust, by Frank P. Breckinridge.

New York University Law Quarterly Review, March (New York City)—Classification of Law, by Albert Kocourek; A Comparative Study of the Corporation Laws of the States of New Jersey, Delaware, Maryland and New York, by Vincent W. Westrup; The "Vienna School" and International Law, by Josef L. Kunz; Legal Election Problems in New York, by Paul Christenfeld.

University of Chicago Law Review, March (Chicago)—The Autobiography of an Ex-Law Student, by Robert M. Hutchins; The Doctrine of Res Ipsa Loquitur, by Charles E. Carpenter; Third Party Practice under the New Illinois Practice Act and Chicago Municipal Court Rules, by Charles O. Gregory; Mansfield and Blackstone's Commentaries, by Julian S. Waterman.

Journal of Air Law, April (Chicago)—The Problem of Liability for Damages Caused by Aircraft on the Surface, by André Kaftal; The Federal Work Relief Program and State Aviation Encouragement, by Fred L. Smith; Recent Developments in Air Transportation, by James H. Doolittle; Universality Versus Nationality of Aircraft, by Margaret Lambie.

Oregon Law Review, February (Eugene, Ore.)—Common Objectives for Law Schools and Bar Examiners, by Philip J. Wickser; The Constitution, the Supreme Court and the N. I. R. A., by Ray A. Brown; Current Problems of Public Utility Rate Regulation, by Irvin Rooks and Harry R. Booth; The Emergency Railroad Transportation Act (1933), by R. V. Fletcher; How the Common Objective of Bar Examiners and Law Schools Can Be Achieved, by Douglas B. Maggs.

Columbia Law Review, February (New York City)—Legal Science and Reform, by Hessel E. Yntema; The Present Status of the Six Months' Rule, by Thomas O. Fitzgibbon; The Industrial Purchaser and the Sales Act, by Nathan Isaacs; Crime, Law and Social Science: A Symposium, by Beardsley Ruml, K. N. Llewellyn, Richard McKeon.

Air Law Review, January (New York City)—The Year 1933 in Aeronautics, by Reginald D. Cleveland; Legal Questions Concerning Aerodromes on the Open Sea, Usually Referred to as Floating Islands, by Roberto Sandiford; The International Seadrome, by James Brown Scott; The California Doctrine of Res Ipsa Loquitur as Affording an Inference of Negligence and Not a Presumption of Law, by Warren Jefferson Davis.

University of Pennsylvania Law Review, April (Philadelphia, Pa.)—Noise as a Nuisance, by William H. Lloyd; The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages, by Ralph S. Bauer; "Jeopardy" During the Period of the Year Books, by Marion S. Kirk; Nebbia vs. People: A Milestone, by Morris Duane.

Constitutional Aspects of National Recovery Program

(*Continued from page 289*)

tion ultimately results in administration conducted in large measure by subordinates, and free from practical restraint upon the part of the judiciary, except in the case of obvious and flagrant abuse of power.

If these Acts and the implications contained therein and in their administration be valid, then there has been accomplished a complete change in the theory of our government, and in the relation of the Federal and State governments to each other, affecting both the rights of the States and the activities of every individual. It has not been the purpose of this paper to discuss the wisdom or unwisdom of such change, but it seems important that we should not only know the road on which we are traveling but the destination to which it leads.

Review of Recent Supreme Court Decisions

(*Continued from page 298*)

that to the effect that the tax is required of the appellant on all gasoline sold, and that this is unreasonably discriminatory, since purchasers using for a purpose other than motor fuel may procure a refund. But no injury to the appellant was found in this, since the distributor is merely an agent to collect the tax. In regard to this MR. JUSTICE ROBERTS said:

> The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the XIV Amendment. Complaint is made of several features of the law which are said to create arbitrary discriminations. Appellant first says that as it must pay to the state a tax of three cents on every gallon of gasoline imported, whereas the user who employs the gasoline purchased for some other purpose than motor fuel may obtain a refund of the tax paid in respect of the fluid so used, the law attempts to impose a tax on the distributor for the benefit of persons who buy or use gasoline for some purpose other than the operation of a motor vehicle on the highways, and that the result is the imposition on the distributor of a tax for the benefit of this other class of persons.
>
> The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does. It cannot therefore be said that any tax is laid upon the appellant in ease of another class of taxpayers.

The case was argued by Messrs. Paul E. Roadifer and M. D. Kirk for the appellant and by Mr. L. W. Powers for the appellees.

Taxation—Federal Inheritance Tax—When Not Retroactively Applied

The Revenue Act of 1921, Section 402, imposing an inheritance tax on a decedent's gross estate, determined by including the value at the time of his death of all property to the extent, among other things, of the interest therein held jointly or as tenants by the entirety by the decedent and another person, is not retroactively applied by including in the value of the decedent's estate one-half the value of real estate held jointly by himself and his wife at the date of the decedent's death, although the joint estate was created prior to the enactment of the statute.

Griswold v. Helvering, Adv. Op. 14; Sup. Ct. Rep. Vol. 54, p. 5.

In this opinion the Court disposed of a question as to whether Section 402 of the Revenue Act of 1921 was applied retroactively. That Act, imposing an inheritance tax, provides in Section 402:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. . .
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person. . .

The decedent died in 1923, while the quoted provision was in effect, holding, as a joint tenant with his wife, certain real estate conveyed to them in 1909. This the commissioner valued at $90,000 and included the whole amount in the decedent's gross estate in fixing the inheritance tax. The Board of Tax Appeals ruled that only the decedent's one-half should have been included, and the Circuit Court of Appeals affirmed the Board's ruling.

On certiorari, this was affirmed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND. In reaching its conclusion the Court rejected the contention that the Act was applied retroactively, pointing out that the tax was directed at the decedent's interest at the time of his death, rather than at the creation of such interest.

> Whether this application of the statute gives it a retroactive effect is the sole question here involved and with that we find no difficulty. Under the statute the death of the decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. . . And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

The case was argued by Mr. William N. Haddad for the petitioner and by Mr. Erwin N. Griswold for the respondent.

The National Recovery Act: Is It Constitutional?

(*Continued from page 280*)

this recovery program. It did not concern the question as to whether the Constitution should be modified and changed. It was directed solely to the relation of the Act to the Constitution as it is written and as it has been interpreted. We leave these other questions to other times and other places. If regulation such as that imposed by this Act is desired by the people, it can doubtless be lawfully secured. But—and I quote Justice Holmes—"a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way."[60] Whatever then may be the answer to these questions of policy and politics, for the lawyer who has taken the oath there is, as to this Act, but one problem. Is the Act within the Constitution? It is not, and his duty is clear. He should so declare. Higher than any obligation the lawyer owes to some supposed immediate public welfare, is his duty to sustain that charter of our liberties.

60. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416.

LETTERS OF INTEREST TO THE PROFESSION

Amending the Federal Securities Act: A Reply

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In an interesting article in the Journal for April Professor E. Merrick Dodd of the Harvard Law School maintains that certain of the suggestions for amending the Federal Securities Act which I offered for consideration in a summary of an address printed in the Journal for February would impair the fundamental purpose of the act. I do not find anything in Professor Dodd's discussion which leads me to agree with that assertion.

I am glad that Professor Dodd shares the general recognition that there are serious defects in the Securities Act and that the act should be freely discussed and properly amended. It will be helpful if the discussion can be carried on in that objective spirit which so strongly characterized the great legal thinkers who have in the past enriched the Harvard Law School. The solution of complex problems of statute making is hardly a matter of inspiration. Counsels born of experience may well have place without challenge beside those born of abstract consideration.

Professor Dodd takes it to be the fundamental purpose of the act

". . . that the security selling business shall be regulated in a manner which will give the ordinary investor, particularly the investor of small means, adequate protection against losses *which are due to misrepresentation or concealment of material facts by those who put securities on the market.*" (Italics mine.)

I am in full sympathy with that purpose. The true objective seems to me rather broader than that which Professor Dodd has indicated: it is to protect the investigator, large and small alike, from losses—losses however caused. Providing new legal remedies is but one method to that end, and the use of that method is subject to limitations not manifest from the mere letter of the statute. The degree of protection afforded to investors does not increase in direct relation to the severity of the law, any more than actual protection against violence increases with the severity of the criminal penalties. A statute must be appraised not as a mere problem in logic but in all its practical aspects as well.

It is my belief that the act as it stands overreaches sound standards of protection in those very features so valued by Professor Dodd, and to that extent is calculated to hurt the investor, particularly the small investor. Professor Dodd regards it as fundamental to the act that an investor be given the legal remedy of rescission or damages for misstatements or omissions in documents upon which the investor has never relied, the very existence of which may not have come to his knowledge. Professor Dodd amplifies the case for this from the standpoint of legal theory along the familiar lines of imposing responsibility for the ultimate consequences of conduct. But the establishment of a right to legislate in a certain way does not establish the social desirability of the legislation. To point out the legal possibility is not to conclude the discussion, as Professor Dodd seems to assume, but merely to initiate it.

My objection to the statutory device of liability for representations to persons who have not actually known about them or relied upon them is not that the imposing of such liability is lacking in due process, but is largely that the use of this device is likely to work badly from the standpoint of the investor. Professor Dodd maintains that the investors whom he desires to protect "are quite incapable of making any careful investigation of the securities they buy." He is apparently willing that such people should be encouraged by law to act in the full confidence of their ignorance, relying upon new legal remedies to relieve them from any unfortunate consequences. Such a policy fortifies the investor in the belief that investment of savings is on a par with hasty purchases of canned vegetables, to which Professor Dodd refers.

On the question of policy, not on the question of loyalty to investors, I differ. To have the Government tell investors that they need not attempt to inform themselves about security they propose to buy seems to me to tend to delude them. Legal aids to investors should not be such as to minimize the importance of care and the exercise of business judgment in the making of investments and the necessity for making actual use of available information. The use of such judgment and the actual employment of information made available to investors may well furnish more real protection against losses than remedies applicable only where there is some misinformation.

Why should the Government in its effort to protect investors proceed primarily by amassing in Washington, as it is doing now, vast quantities of detailed information in such form that an ordinary investor cannot make use of it? It is not to be merely assumed that registration statements of several hundred pages, laboriously and expensively prepared, reposing in Government files, and condensed prospectuses of fifty printed pages or more, do very much to help the genuine investor in the process of actually selecting securities. It is clear, of course, that they do make work of a sort for the lawyer, both in preparation and in probable litigation.

It might be more effective to proceed rather on the basis of requiring by law a prospectus of reasonable compass, in understandable form, and furnishing an incentive for the prospective investor to use it. That is the basis of the English Companies Act, and it seems to me better calculated to afford real help to the investor. Professor Dodd objects to what he terms "immunizing" the issuers of securities from liability to ultimate purchasers with whom they have no legal privity. May we not, in contrast, object to a statutory provision immunizing prospective purchasers from any duty of self help or education?

From the standpoint of *realistically* protecting investors against losses, other factors also must be taken into account. If the act with its uncertainties and its extreme liabilities and penalties operates to decrease the flow of capital into industry, existing investors, as well as prospective investors, may find themselves prejudiced. The industrial process cannot be maintained without the supplying of capital for refinancing and expansion. Unless the Government is permanently to take over this function, cessation of the flow will cause existing investments to droop and new investments to wither in the bulb like vegetation in a waterless field.

Again, on the question as to the make-up of boards of directors, while Professor Dodd is pleased with the prospect of driving off boards those who cannot devote most of their time to the activities of the particular enterprise, the prudent investor may well be concerned over the effect of such a course. Boards of directors cannot be entirely made up of full time managers or executives: they should contain business men of general experience and judgment whose counsel can be drawn upon in matters of policy. A board made up of accurate accountants and salaried executives might make a minimum of misstatements but might run the company into failure through mistakes of policy.

To my thinking, regard for the very objectives which Professor Dodd insists upon dictates change in some of the provisions of the act which he would retain. He himself indicates very serious practical objections to having the act unduly severe by pointing out the grave hazards as to the actual outcome of jury trial under such provisions.

To Professor Dodd, the absolute liability of issuing companies for any

error or omission, even though the utmost care was exercised, should be retained. I venture to continue to differ on this point, again on grounds of social policy. I repeat that in my judgment no justification appears for proceeding on the basis that the investor should be treated as an involuntary purchaser of securities offered—as a mere automaton. When the investor buys he does so for ordinary business reasons and his act rests upon no higher plane than that of the seller.

How can a buyer of securities, or any one else, expect more of a board of directors or of officers than the exercise of honest judgment and due care? Those being exercised, the existence of error is a risk inherently incident both to the conduct of business and to the practice of investment, and this inherent risk the investor may well be called upon to share. Protect him to the full against dishonesty or negligence, but to insure him against error which could not have been guarded against by the exercise of care is more than is his due and than the practical operation of business permits.

It has not been demonstrated that to make the management of business enterprise and the conduct of financing forbidding and burdensome to reasonable, honest men will in the long run benefit investors or the public generally. The problem of getting the Securities Act into a form in which it will afford the maximum of genuine protection to investors without sacrifice of their own larger interest is one which should be further discussed in the spirit of the search for truth which the complexities of the problem demand.

ARTHUR A. BALLANTINE.
New York City, April 13, 1934.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Massachusetts

Special Committee of Bar Association of City of Boston Recommends Further Activities for Organization—Welcoming New Members—Plan to Give Membership Larger Participation in Work

A special committee of the Bar Association of the City of Boston, appointed to consider the question of additional activities which the Association might properly undertake, has presented its report. It is published in the Bar Bulletin (Feb. 14) and inasmuch as the question is one of interest to all Bar Associations, a brief digest of the committee's suggestions is here printed.

The committee submits recommendations on the four subjects of Reception to New Members of the Bar, Legal Lectures, Program to Assist in Bringing About Judicial Reform, and Proceedings within the Association. On the first subject the report says:

"The committee feels that the Bar Association should hold a reception regularly on the afternoon or evening of the day that the new members are sworn in to the bar to make that day one that they will never forget. We believe that it presents an unusual opportunity to create among the young lawyers an atmosphere of good fellowship and to bring home to them the appreciation of the fact that it is a profession upon which they are about to engage, and that they will meet with responsibilities and confidences not generally present in ordinary business. It is estimated that as a result of the January examinations there will be about one hundred fifty new members admitted to the bar. The date will probably be some time about the middle of April. We should arrange to have some members of the bar give short talks to the new members on legal ethics, the good fellowship of the bar and the high standard of dealings which we should at all times cultivate and insist upon in our dealings with fellow members of the bar, as well as with clients. It is suggested that at the first of these meetings the members of the bar practicing in Suffolk County who have been admitted during the last two years be also invited."

The committee recommends arrangements for legal lectures, as follows:

"The active lawyer has little time to keep pace with the constant development of the law, except in the special field in which he is particularly interested. We therefore recommend an annual series of lectures by recognized authorities under the auspices of the Association.

"The subjects to be presented should be of general interest to the members rather than highly specialized. Qualified men in the vicinity of Boston could, we believe, be obtained to lecture without an honorarium, so that no admission charge would be required, at least at the start.

"It is suggested that the lecturers be invited to speak on such subjects as the following: 'The Restatement of the Law,' 'Recent Important Massachusetts Decisions,' 'Recovery Legislation,' or any other subject of general interest.

"The Bar Associations of Cleveland, Cincinnati, New York City and other places conduct similar lectures. In Cleveland they charge $2.00 for tickets for six lectures for the older lawyers and $1.00 for lawyers practicing less than two years, and conduct two series of lectures each year. They have had the following speakers: Dean Roscoe Pound—'Recent Developments in the Law of Equity of Interest to Practicing Lawyers,' Professor Samuel Williston—'Some Problems in the Law of Contracts of Interest to Practicing Lawyers,' Dean Francis H. Bohlen—'Some Problems in the Law of Torts,' Professor Austin W. Scott—'Current Problems in the Law of Trusts.' They have invited outstanding authorities and the lectures have been a notable success."

The most important of the recommendations takes the form of a "Program to Assist in Bringing About Judicial Reform." Basing the statement on past experiences in the State, the committee declares that "it is impossible to consider or treat any aspect of our judicial system as a thing to be improved by itself if we hope to accomplish anything more than temporary patchwork. We have been led irresistibly, therefore, to the conclusion that we should recommend to this Association as its principal objective the bringing about of a study and revision of the entire judicial system."

It therefore recommends the adoption of a resolution to this effect by the Association, and suggests, if the resolution is adopted, that the President immediately appoint a committee to supervise and stimulate the carrying out of its declared purposes. The committee, it adds, should have the following instructions:

"(a) To consult with the Judicial Council as soon as possible and find out whether it could and would undertake such a work; what assistance it would need; and what funds.

"(b) To obtain the advice of a professional publicity expert on the best manner of presenting this whole project to the bar and to the public, and obtaining their support.

"(c) To consult with other bar associations in the Commonwealth for the purpose of obtaining the adoption of the same or a similar resolution.

"(d) To consult, and if possible, cooperate with the other groups now engaged in various fields of legal reform.

"(e) At the proper time, and only after a careful consideration of the state of public opinion and the chances of success, to arrange for the presentation to the legislature of such draft acts as may be necessary to give the Judicial Council the power, assistance and funds to undertake the work.

"(f) To report to the entire Association, at reasonable intervals, the progress being made, and to see that the entire membership is notified of the exact time and place of any legislative hearing on the draft acts mentioned above."

Under the last head the committee submits a plan to meet the criticism

that the Association fails to provide a sufficient opportunity to its members to participate in its general activities. It suggests that "the various committees make reports periodically to the general membership as to their activities. These reports might be interim reports of the progress being made by the committees or of the matters under investigation by them, or might be final reports of the committees' work for the year. The type of report would be largely determined by the nature of the committees' activities." It adds:

"We recommend that regular meetings by the Bar Association be held, at which the chairman or some other member of each committee would be called upon to make a report for the committee. Following the presentation of the report, an opportunity for a discussion of limited duration on the report should be afforded to the members of the Association. Should a question of sufficient importance be raised by the discussion, it might be further discussed at a special meeting to be arranged for that purpose. We further suggest that the final report of any committee be actually submitted to the organization before being voted upon.

"An opportunity to discuss the activities of the committees and suggest other activities would assure the general membership that the Association belongs to them, and that all of its activities are undertaken on their behalf. It would have the further effect of placing the full power of the Bar Association behind each committee and thereby strengthening the committees in their work."

The report is signed by Moses D. Feldman, *Chairman*, Robert H. Holt, Robert H. Hopkins, Robert M. Morrison, Lispenard B. Phister.

Michigan

Michigan State Bar Association Holds Bar Coordination Meeting — President Earle W. Evans Delivers Address at Banquet

On Friday, March 9, at the Hotel Statler in Detroit the officers and directors and the four committees of the Michigan State Bar Association engaged in the work of the National Bar Program, that is, the Committees on Criminal Law and Its Enforcement, Unauthorized Practice of Law, Judicial Selection and Tenure, and Legal Education and Admission to the Bar, and the Association's Committee on Public Relations met with the officers and the corresponding committees of the locar bar associations in Michigan. The principal objective of the meeting was to facilitate the work of the committees and to carry forward the National Bar Program. One session of the meeting that was held in the morning was, however, devoted to the general topic of cooperation between the Michigan State Bar Association and the local bar associations of Michigan. Twenty-nine of the forty local bar associations of the state were represented at the meeting, the total number of persons registered being one hundred sixty-four.

Hon. Philip J. Wickser of Buffalo, New York, Secretary of the American Bar Association's Committee on Coordination, was a guest at the meeting and addressed the morning session. He presented an interesting and instructive plea for coordination among the bar associations of the state and cooperation between the members of the bar. He also explained in some detail the National Bar Program, its purpose, and the results which are being achieved by it.

The afternoon session was devoted to section meetings for state and local bar association committees on the four subjects of the National Bar Program. At these meetings the discussion was centered around the most important of the issues before the several committees, and in each of the meetings discussion was directed particularly to the questionnaires submitted by the American Bar Association in connection with the National Bar Program.

The meeting closed with a banquet, the principal speaker being Hon. Earle W. Evans of Wichita, Kansas, presi-

dent of the American Bar Association. Mr. Evans' message contained the plea to lawyers to coordinate their activities for the restoration of public respect for the legal profession. Specifically he urged that the profession bend its best efforts in the direction of improving the enforcement of criminal law, and he also urged that attention be given the matter of preventing unauthorized practice of law by laymen so far as such unauthorized practice is resulting in harm to the public. Mr. Evans' address was most enthusiastically received.

South Carolina

South Carolina Bar Association Approves Plan for Bar Incorporation—Senator Steiwer of Oregon Discusses National Recovery Act—Alva M. Lumpkin Elected President

The South Carolina Bar Association, at its recent annual meeting held at Columbia during the week of March 15, approved a committee recommendation for the incorporation of the Bar of the State. The proposed bill contains features made familiar by legislative incorporation acts in other States. Under it the President and Vice-president would be elected by the State Bar and the Secretary and Treasurer by a council composed of one member from each judicial circuit and the President.

In connection with the meeting Senator Frederick Steiwer of Oregon delivered an address on the National Recovery Act in the Hall of the House of Representatives.

"In the many complexities which surround the recovery act," he said, "there is much to lead to the conclusion that the act may be sustained in its entirety, but that in the consideration which the courts give to it severe limitations may be placed upon its construction.

A. M. LUMPKIN
President, South Carolina Bar Association

"The result of such limitations will be that although the act is sustained, certain of the codes may be held as extraneous to the act. Practices under the codes made strictly in compliance with their provisions may therefore be held as improper because done without the sanction of the law.

"The problems treated by me in the comment which I submit tonight are only the beginning of the great series of problems which will grow out of the administration of the act and it may well happen that the scope of the law shall be measurably curtailed and the efforts of the federal authority restricted within narrower bounds than presently contemplated, and then we will be confronted with the problems of legislative alteration or amendment, or with the election to abandon the experiment as a mere incident of the depression.

"Whether we will then go forward or turn back to the old order will be America's responsibility of tomorrow."

Dean A. B. Dobie of the University of Virginia Law School spoke at the annual dinner and Judge Martin F. Ansel, of Greenville, the sole survivor of the group that founded the Bar Association fifty years ago, gave interesting reminiscences of the history of the organization. In his address, according to the report of the meeting in a Columbia newspaper, Dean Dobie pointed out that vital human rights, even life itself, may hinge on the meaning of a word.

"The laymen," said Dean Dobie, "is apt to think that the defining of a word or the interpretation of a phrase or clause is for the critic, scholar, lexicographer, or exegete.

"But, when human rights are at stake such as life, liberty or property, there is only person in our civilization who can effectively define and that is the judge."

Dean Dobie gave illustrations of when life or death depended on the definition of a word or phrase and, touching upon the intricacies of the law, said:

"A man may be dead, for some purposes, under our law, and not dead for other purposes. The same is true of birth and marriage."

The speaker said that, contrary to the generally accepted view, words the courts must define were not merely technical legal expressions but also commonly used terms. He said English and American courts had interpreted more than 200,000 words and expressions.

He cited as an illustration a case in

which the Georgia Supreme Court was called upon to rule whether a watermelon is a fruit or a vegetable and decided it was both.

The Association honored Judge M. F. Ansel by conferring on him the first life membership in the history of the organization.

Hon. Alva M. Lumpkin, of Columbia, was chosen President, and the following other officers were elected: John M. Cantey, Jr., Secretary and Treasurer; Paul A. Cooper, chairman of the executive committee, and D. W. Robinson, Jr., and John W. Crews, members of the executive committee, all of Columbia.

The Movement for Bar Integration

Seven years ago the Kentucky State Bar Association resolved upon inclusive organization by statute. In three successive regular sessions of legislature its bills were defeated. And three times the Association resolved to return to the fight and achieve success. In the recent regular session the Bar Association won a notable victory. Its bill was passed in the house by a vote of 82 to 2; in the senate by a vote of 29 to 7. The act differs from all others; it directs the Court of Appeals to determine by rules the nature of the state bar's organization and mode of operation. The legislative session terminated February 15, and almost immediately upon the taking effect of the act the discussions of suitable rules were arranged by the Court of Appeals with representatives of the bar. The act is unfortunate in two respects. First, in limiting members' dues to two dollars per years. The gross income may be larger than that of the Association with dues of four dollars, but there will necessarily be increased expense. But this is not presently a very serious matter. It is safe to presume that a majority of the profession will insist upon an amendment of this clause as soon as the benefits of inclusive organization and self-governing powers are appreciated. Second, there is a provision which permits any person not holding himself out as a practicing attorney "to write" a deed, mortgage or will. The language is difficult of practical interpretation, and the protection of the public will be afforded by the courts, but this text, whatever its validity, has no place in a bar organization act.

Quite recently committees have been put to work in South Carolina and Arkansas to study bar integration and report on the best mode of approach. It now appears probable that in 1935 there will be bar bills introduced in about thirteen states. There have been instances of complete achievement with such measures upon their first introduction but more commonly the first fight is one which results only in developing and hardening the will of the proponents. The history of these efforts since 1923 seems to prove little more than what is true of all legislation, that results are fortuitous and unpredictable, and that there must be determination to persevere in the work, especially outside the legislature.

By an amendment in 1931 the Alabama State Bar was empowered to determine and fix the requirements for admission to practice. Action was recently taken on this subject. The new rules require all candidates taking the examination in 1935 to have had one year of pre-legal college education, or its equivalent, and all candidates taking the examination thereafter to have had two years of college education or its equivalent; the study of law must be three years in a school approved by the American Bar Association or four years in an unapproved school. Applicants will be permitted to take not more than three examinations.

At the mid-year meeting of the Wisconsin State Bar Association Chairman Hardgrove of a bar integration subcommittee reported a decision adverse to the idea of asking the supreme court to organize the entire bar of the state by rule. The opinions in the last Cannon case (206 Wis. 374) and In re admission of certain persons to the Bar (211 Wis. 337) foreclose such an approach.

The "1934 Year Book" of the State Bar of Oklahoma represents a step in advance in bar publications. In a little more than 100 pages it presents in convenient form the bar act and related statutes, the rules of professional conduct, the causes for disciplinary action, the rules of procedure in disciplinary cases, the rules controlling election of officers, advisory opinions on problems of ethics (45 to 64 incl.), the officers and governors, the administrative committees and standing committees, and a directory of all active members. It would seem that the work of the Board of Governors in rendering advisory opinions is a very useful and educative proceeding.

Under the leadership of President Giles J. Patterson the Florida State Bar Association has been formulating a plan for affiliation with local bar associations with the expectation that this step will lead in time to integration under statutory powers. Its immediate effect will be to aid the State Association in its program of legislation. Having in the past two years revised chancery procedure and probate procedure, it now has a committee drafting a revised judicial article, and hopes soon to begin work on several lines of statutory revision. There are few states in which the bar has performed an equal amount of constructive work. As pointed out in President Patterson's annual address on March 22 the Association has great resources for public work as yet unemployed and can readily keep a number of committees on legislation at work at the same time.

A rigid system of judicature in a jurisdiction where there is a considerable increase in litigation has always resulted in congestion and delay. That this is not necessary has not been generally understood. Of late it has appeared that the system is not so rigid that the judiciary cannot be supplemented from the bar. In Massachu-

setts there has been some relief by the use of referees in ordinary actions; in Los Angeles county several hundred lawyers have assisted the court by trying both jury and non-jury cases in the past year; and recently in Oklahoma the Supreme Court and newly established Judicial Council have arranged to make up fifty commissions, each having three practitioners as members, to aid the Supreme Court in clearing up its docket. The Board of Governors of the State Bar has made up a list of 300 practitioners from which selections will be made. This action is made possible by the conception on the part of the Supreme Court that, in the performance of a duty imposed by the constitution, it inevitably possesses the power to select aides and advisors without waiting for action by the legislature, which, under the same constitution, is given no authority, express or implied, in respect to strictly judicial functions. On the same sound constitutional theory the Supreme Court, assisted by the Judicial Council, contemplates an early revision of appellate and trial procedure, which is another essential element in rendering justice promptly.

Following is the Kentucky Bar Act as enacted in regular session adjourned March 15, 1934:

"An act providing for the adoption and promulgation by the Court of Appeals of Kentucky of rules and regulations defining the practice of law, prescribing a code of ethics governing the professional conduct of attorneys at law and the practice of law, establishing practice and procedure for disciplining, suspending and disbarring attorneys at law, providing for the organization and operation of a bar association, prescribing fees to be paid for the administration of this act, and the collection and disbursement thereof.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. The Court of Appeals of Kentucky shall, from time to time, adopt and promulgate such rules and regulations as the Court may see proper.

"(A) Defining the practice of law, but no provision herein shall prevent any person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent any party from drawing any instrument to which he is a party.

"(B) Prescribing a code of ethics governing the professional conduct of attorneys at law and the practice of law.

"(C) Establishing practice and procedure for disciplining, suspending, and disbarring attorneys at law.

"(D) Organizing and governing a bar association of the attorneys at law of this state to act as an administrative agency of the Court of Appeals of Kentucky for the purpose of enforcing such rules and regulations as are prescribed, adopted, and promulgated by the Court of Appeals under this act, providing for the government of the State Bar as a part of the judicial department of the state government, and for such divisions thereof as the Court of Appeals shall determine, and requiring all persons practicing law in this state to be members thereof in good standing, and fixing the form of its organization and operation.

"(E) Fixing a schedule of fees to be paid for the purpose of administering this act, and rules and regulations to be prescribed, adopted, and promulgated hereunder for the collection and disbursement of such fees, provided, that the annual fees shall not exceed the sum of two ($2.00) dollars.

"Sec. 2. When and as the rules of Court herein authorized shall be prescribed, adopted, and promulgated, all laws or parts of laws in conflict therewith shall be and become of no further force or effect to the extent of such conflict.

"Sec. 3. If any section, subdivision, sentence, or clause of this act shall be held invalid or unconstitutional, such fact shall not affect or impair the validity of the remaining portions of this act.

The annual meeting of the Bar Association of the Fifteenth Judicial District (Neb.) was held at O'Neill in February, and officers were elected as follows: President, W. T. Wills, Butte, Neb., Vice-President, William M. Ely, Ainsworth; Secretary-Treasurer, L. G. Nelson, Bassett; Member Executive Committee, H. G. Greenamyre, Springview.

Official Directory, 1933-1934

President

rle W. Evans.....Wichita, Kansas
First National Bank Building

Secretary

illiam P. MacCracken, Jr.....Washington, D. C.
National Press Building

Assistant Secretary

ichard Bentley.....Chicago, Ill.
209 S. La Salle St.

Executive Secretary

live G. Ricker.....Chicago, Ill.
1140 North Dearborn Street

Treasurer

ohn H. Voorhees.....Sioux Falls, S. D.
reasurer's Office, 1140 North Dearborn St.....Chicago, Ill.

Executive Committee

larence E. Martin (Ex. Of.).....Martinsburg, W. Va.
eorge H. Smith (Ex. Of.).....Salt Lake City, Utah
dgar B. Tolman (Ex. Of.).....Chicago, Ill.
larry S. Knight.....Sunbury, Pa.
Walter P. Armstrong.....Memphis, Tenn.
Glenn J. Fairbrook.....Seattle, Wash.
Joseph F. O'Connell.....Boston, Mass.
A. L. Scott.....Pioche, Nev.
William L. Ransom.....New York, N. Y.
Frank J. Hogan.....Washington, D. C.
Harry P. Lawther.....Dallas, Tex.
Frederick H. Stinchfield.....Minneapolis, Minn.

Vice-Presidents

First U. S. Judicial Circuit
Charles H. Strong, Second Circuit.....New York, N. Y.
John P. Nields, Third Circuit.....Wilmington, Del.
J. Crawford Biggs, Fourth Circuit.....Raleigh, N. C.
George H. Terriberry, Fifth Circuit.....New Orleans, La.
Oscar C. Hull, Sixth Circuit.....Detroit, Mich.
R. Allan Stephens, Seventh Circuit.....Springfield, Ill.
Jesse A. Miller, Eighth Circuit.....Des Moines, Ia.
Charles A. Beardsley, Ninth Circuit.....Oakland, Calif.
W. C. Kinkead, Tenth Circuit.....Cheyenne, Wyo.

(Standing and Special Committees on page 681, Nov. 1933 issue. General Council and Officers of Sections, pages 619, 620 Oct. 1933 issue.)